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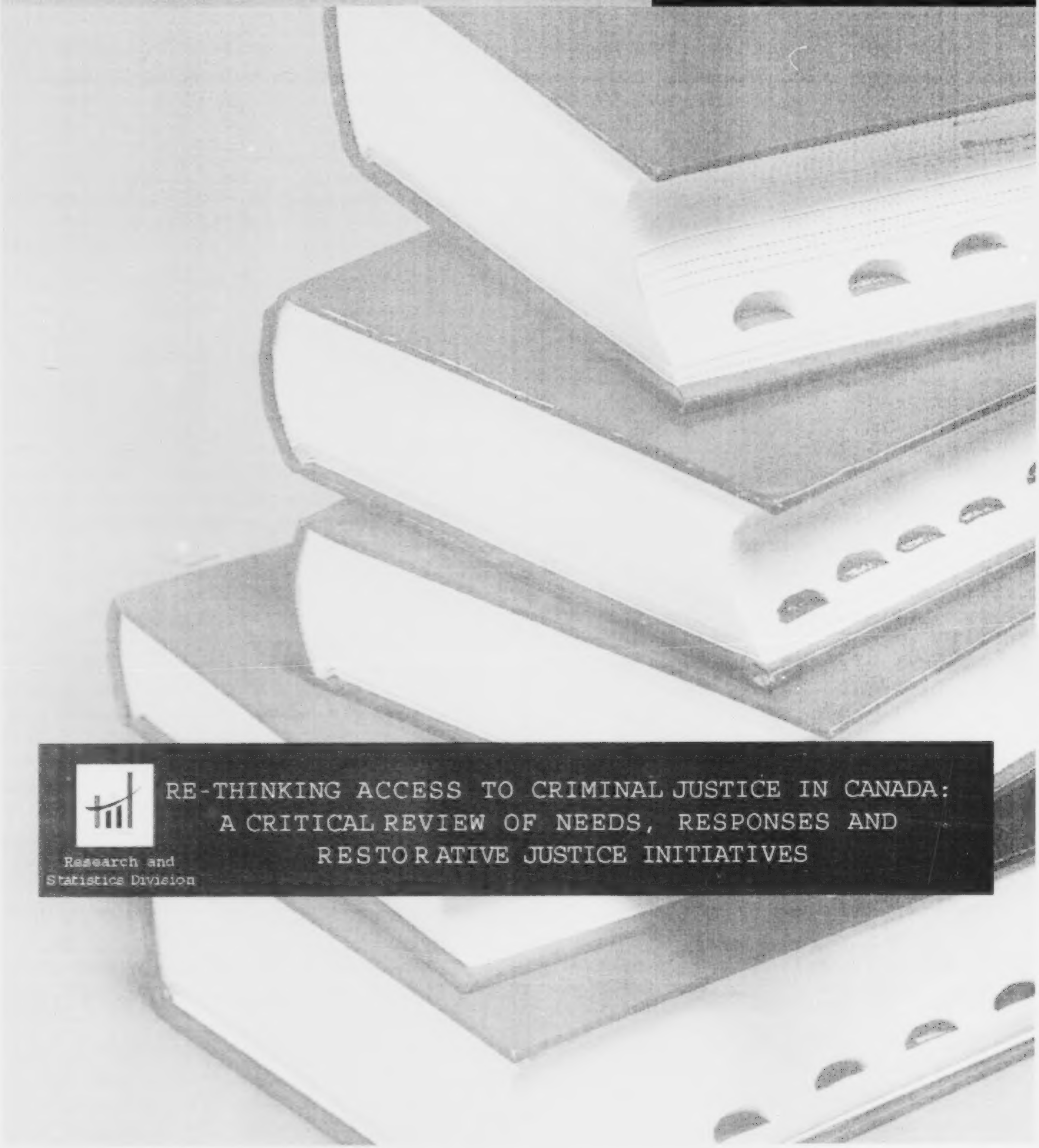

RE-THINKING ACCESS TO CRIMINAL JUSTICE IN CANADA: A CRITICAL REVIEW OF NEEDS, RESPONSES AND RESTORATIVE JUSTICE INITIATIVES

Research and
Statistics Division

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EXECUTIVE SUMMARY

This paper provides a critical assessment of some current issues about access to justice in Canada, with a special focus on criminal justice. The paper identifies recent trends in the literature about criminal justice in Canada and in related common law jurisdictions, including the United States, the United Kingdom, Australia and New Zealand; and the development of restorative justice processes to augment or replace traditional approaches to criminal justice. Overall, the paper is intended to provide a review of selected literature with critical commentary about current trends in criminal justice, and to offer suggestions about empirical and other research initiatives designed to assess future needs.

Chapter 1 examines the context and concepts of criminal justice, exploring the change in emphasis from *access* to justice to access to *justice*. The chapter begins by noting comments presented by Michael Zander in the Hamlyn Lectures in 1999, suggesting that recent reforms in the United Kingdom emanated "not from a desire to improve access to justice but from the Treasury's need to control the budget". Such a comment reveals the complex social, political and legal context within which current discussions about access to justice occur. Using Zander's comments as a starting point, this chapter provides an overview of the challenges identified in the literature about how to seek justice, rather than merely improving access to current legal processes. In particular, the chapter focuses on three aspects:

i) the context of access to justice developments, including the relationship between civil and criminal justice, and recent initiatives in criminal justice;
ii) the public/private dimensions of justice, including issues about resources, capacities and powers; and
iii) the concept of equality in promoting social justice.

i) the context of access to justice developments: Recent developments in access to justice have been significantly influenced by the work of the Florence Access-To-Justice Project, a comparative assessment of initiatives world-wide. According Cappelletti and Garth, there were three "waves" of access to justice reforms: the "first wave" of the movement involved provisions for legal aid; the "second wave" was a group of substantive and procedural reforms which enabled legal representation for more "diffuse" interests including environmental and consumer protection. By contrast, the "third wave" was labelled by Cappelletti and Garth the "access to justice" approach because of its aspirations to attack barriers more articulately and comprehensively. Although the focus of the Florence Access-To-Justice Project was civil justice, it is possible to identify a number of similar "waves" of developments in the criminal justice context; for example, recent developments in restorative justice for criminal law matters appear to be "third wave" reforms. Moreover, beyond criminal justice, these new developments are also linked to "transformative justice" - processes which take account of broader concerns, including traditional civil law matters.

Such an analysis of access to justice initiatives in civil law and criminal law contexts suggests a need to reassess the continuing validity of distinctions between these categories. At the same time, the literature suggests that there is a crucial distinction in the processes used to respond to criminal, by contrast with civil, wrongs. In the civil process, the victim is in charge; by contrast, a wrong done in the criminal law context is a wrong done not only to the victim but also to the community. To the extent that ideas of restorative justice create opportunities for greater involvement by victims in criminal justice processes, and more substantial connection between victims and offenders, they tend to blur existing distinctions between criminal and civil law processes. In addition, the literature suggests that it may be important to consider the extent to which gender may need to be considered in relation to both traditional criminal justice processes and restorative justice practices, an issue which is addressed later in the paper.

Literature on criminal justice also reflects differing perspectives about the goals of criminal justice. The paper outlines the competing models identified by Herbert Packer in 1964: "crime control" and "due process", and the extent to which later commentators, including John Griffiths, suggested that both of Packer's models represented different forms of the "battle model" of criminal justice, by contrast with a "family model." In this context, Kent Roach has argued that these different models reveal different assumptions about the extent to which the interests of individuals are always opposed to those of the state, or, on the other hand, assume that "the state and the accused, like a parent and child, had common interests if only because they continued to live together after punishment". In this way, recent developments in restorative justice appear linked to earlier debates about appropriate models for criminal justice.

The literature also reveals different theories of punishment and sentencing, including goals of rehabilitation, deterrence, and "just deserts". Although the "just deserts" theory of sentencing has achieved a good deal of acceptance because it relates to "everyday conceptions of crime and punishment, and is also consistent with liberal political theory," commentators like Barbara Hudson have suggested that a theory of "just deserts" sentencing in an otherwise "unjust society" increases punishment for those who are least able to conform to the ideal of autonomous individuals exercising free choices. Criticisms such as these reveal the underlying political nature of sentencing theory. Thus, for some commentators, there is a need for a new kind of justice. As John Braithwaite argued, the restorative justice approach recognizes a relationship between offenders and the societal context in which they offend; by contrast, the traditional emphasis on punishment in response to wrongdoing represents "a failure of imagination".

Restorative justice proponents claim links to much earlier conceptions of crime and criminal processes. They also characterize the commission of crimes in terms of interpersonal or community conflict; thus, the goal of restorative justice is the resolution of this conflict. In this way, restorative justice may be linked to alternative dispute resolution processes in the civil law context. Significantly, the term "restorative justice" has been used to encompass a variety of practices, including arrangements which provide for victim participation, community involvement in dispute resolution, rehabilitative goals, restitution, etc. More significantly, the cultural context of restorative justice is critical, and it is important to recognize that the strongest impetus for restorative justice processes in Canada derive from concerns about the application of Eurocentric ideas of crime and punishment to First Nations offenders and communities. In this context, restorative justice processes ensure that it is community elders, not professionals, who dominate the process; and that "the offender's past victimization and present disharmony can be recognized as the reason for an offence without denying the needs of the immediate victim or the responsibility of the offender".

In relation to this overview of the literature on access to justice, crime and punishment, there are two cautionary comments. One is the need to examine how well reform goals are actually implemented in practice, particularly in a context where there are pressing needs for immediate evidence of change; the possibility of "gaps" between reform goals and their implementation in practice may be exacerbated by pressures of instrumentalism and "the Treasury's need to control the budget". As well, there is a need to be somewhat wary of the goal of community harmony in the context of restorative justice, not only because harmony may be based on dominant ideologies but also because there may be limits to the extent to which they can realistically guarantee voluntariness, agency and voice to the parties.

ii) public and private dimensions of justice: The literature on criminal justice developments also reveals concerns about "private" dispute resolution and policies promoting the "privatization of justice". Much of the literature now emphasizes the need for "community" involvement. As the paper suggests, this literature derives from studies of small-scale societies in close cohesive social systems where there is a need to maintain co-operative relationships. As Barbara Hudson has suggested, the need for "communities" in Western society creates a problem: "without the community, restorative justice is reduced to the competing perspectives of the victim and the perpetrator".

At the same time, there has been positive evaluation of practices of circle sentencing within Aboriginal communities, and there may be a need to reconceive a wider, more liberal construction of the term "community". Yet, at the same time, enhancing the role of the community also means diminishing the role of the Crown in some restorative justice processes. This development may suggest informal recognition of Aboriginal self-government, but it may also subtly suggest that the state has little interest in the concerns of the victim. Concerns have also been expressed about the need for community members and community resources to be allocated to informal justice processes, as well as the extent to which the allocation of greater power to communities in fact empowers those who have traditionally exercised power, thus reinforcing power imbalances and socio-economic inequities in communities.

These concerns are also linked to the need for procedural protection to ensure that victims and offenders, as well as community participants, all of whom may have differential access to economic, psychological or other aspects of individual capacity, may participate effectively. The literature identifies, for example, the possibility that domestic abuse cases may not be appropriate because of power imbalances. As well, opportunities to permit offenders to understand, through the participation of the victim, the human consequences of their actions is only a short step from claims that greater victim involvement is, in fact, for the benefit of the offender and the wider community. While there may be a need, according to some commentators, to reconsider the involvement of victims in criminal justice processes, it is important to adopt a principled approach based on sound evidence in the formulation of criminal justice policies.

These issues also link to the relationship between "privatized justice" and the potential for social change. According to David Garland, the state's "responsibilization strategy" reveals the abdication of direct state intervention through police, courts, prisons, social work, etc. and the adoption of indirect action through non-state agencies, which are encouraged to take responsibility to prevent crime (including neighbourhood watch programmes, security guards, security devices for cars, etc.). In this way, Garland argued that the state remains responsible for punishment of crime through its "law and order" agenda, while defusing into the community responsibility for crime control. In this way, Garland's analysis is linked to broader concerns about the "downloading" of the costs of criminal justice onto communities.

In addition, however, privatization of criminal justice contributes to political goals of law and order by individualizing the victims of crime rather than recognizing "the public" as a whole. In this way, a new relationship is established between the individual victim, the symbolic victim, and public institutions, which represent their interests and administer their complaints.

iii) equality and social justice: Such concerns are also linked to the need to reassess ideas about *access* and *justice*. While much of the literature emphasizes the need for commitment to the rule of law, it is important to recognize the extent to which such a commitment will not, by itself, achieve substantive justice. As Alan Norrie argued, adherence to the rule of law may simply re-enforce existing unequal and perhaps unjust class relationships. In this context, to the extent that restorative justice practices may relinquish formal procedural protections, including legal representation, it may be important to assess how these new developments meet goals of substantive social justice. Some commentators have suggested that restorative justice processes may empower participants in ways that traditional criminal courts cannot, but even proponents like David Trubek recognize that such processes may be captured or co-opted as measures to relieve courts and court congestion - but without making justice more accessible. By contrast, in his recent assessment of restorative justice and social justice, John Braithwaite argued that if both victims and offenders get restoration out of a process, it has progressive rather than regressive implications for social justice. At the same time, others like Richard Delgado have identified the absence of potential for social transformation as a major problem for restorative justice. In such a context, goals of substantive equality and social justice pose hard questions for both restorative justice and traditional criminal justice processes. These questions provide the context and conceptual framework for our discussion of "needs" and "responses" in the chapters which follow. We return to these concerns in the critique in Chapter 4.

Chapter 2 explores the complexity involved in identifying legal needs. For example, while the circumstances of being poor may well create legal needs, it is important to recognize how the needs of poor clients are seldom congruent with just "legal needs". Thus, it has been argued that legal aid initiatives may not necessarily contribute much to social justice and may even perpetuate social injustice. The literature provides a good deal of analysis about the concept of "legal needs" in the context of civil law, but much less in relation to criminal law. Thus, while there is some consensus about minimum standards for legal aid in criminal law matters, for example, there is a more fundamental question about whether legal aid actually addresses "needs" in this context, or whether it simply replicates the legal categories of the criminal justice process. Moving beyond the requirements of legal representation, moreover, some commentators have suggested a need for assessments of communities in relation to crime and other kinds of legal needs. Others have argued that a focus on "legal needs" in relation to the sentencing of offenders raises policy questions about differences among offenders whose needs may differ from each other as well as from some idealized norm.

In the context of restorative justice developments, proponents have asserted that we should redefine the purpose of law as *fulfillment of needs* rather than *protection of rights*. While recognizing the vulnerability of needs-based justice practices, particularly in relation to aspirations of empowerment, proponents of restorative justice have nonetheless asserted its ability to respond to crime by addressing the need for safe communities as well as the need for resolving specific crimes. In a well-known interchange between Daniel Van Ness and Andrew Ashworth, the authors identified some of the positive attributes, as well as the limits, of restorative justice practices. In providing an assessment of the literature about "needs" in criminal justice, this chapter examines these competing ideas in three contexts where restorative justice practices have been advocated: the needs of Aboriginal accused in their communities; the needs of offenders including young offenders and those from racial minorities, and the needs of victims and communities.

i) "needs" for aboriginal justice: No-one associated with the criminal justice system in Canada can ignore its impact on Aboriginal people. Even in provinces such as Ontario, where the rate of incarceration for Aboriginal people is less than in the western provinces, there are good reasons to believe that the figures may underestimate the numbers of Aboriginal people involved with the justice system. Beyond the statistics, however, there is a need to identify *why* there are disproportionate numbers of Aboriginal people in the criminal justice system, in order to design appropriate responses.

Three possible explanations for the over-representation of Aboriginal people in the justice system have been presented. One is the "culture clash" theory, the lack of familiarity of Aboriginal people with the system of justice in Canada, and the resulting need to assist them to participate in it more effectively. For those who espouse this rationale, there is a need for more and better legal services, as well as cross-cultural training programmes and translation services. All the same, a number of commentators have suggested that the culture clash theory is not entirely satisfactory since it does not explain the over representation in the justice system of Aboriginal people who have lived for many years in urban areas of Canada.

A second explanation is the socio-economic theory. According to this theory, the over-representation of Aboriginal people in the criminal justice system is related to their poverty; that is, the likelihood of incarceration has greatly increased for those who are poor, and since Aboriginal people are often the poorest of the poor, they are more likely than others to be represented. Carol La Prairie has suggested that factors such as relatively higher Aboriginal birth rates and the disproportionate number of Aboriginal people currently in the age group most vulnerable to criminal law intervention may also need to be considered, but she has also suggested that poverty may be the explanation for over-representation on the part of Aboriginal people in the justice system. Thus, initiatives based on a culture clash theory will not substantively address problems relating to socio-economic marginalization. Instead, if one accepts this second explanation for Aboriginal over-representation, it appears that initiatives designed to develop self-sufficiency will be more effective. A third theory is regarded by Jonathan Rudin as most persuasive: the theory that colonial policies of assimilation destroyed the lives of thousands upon thousands of aboriginal people. Agreeing with the recommendations of the Royal Commission on Aboriginal Peoples that the colonial legacy must be taken into account in designing interventions, Rudin argued that very different "needs" must be met: indeed, there is a "need" for an indigenous justice system. Others like Kent Roach have also suggested that recognition of Aboriginal justice could reduce incarceration and victimization of Aboriginal people.

Other commentators have carefully identified differences between traditional processes of criminal justice and Aboriginal justice and assessed their relative merits. Some authors point to the decision of the Supreme Court of Canada in *R. v. Gladue* as bringing the notion of healing into the mainstream as a principle that a judge must weigh in every case involving an Aboriginal person. Such approaches recognize "legal needs" on the part of Aboriginal people to be judged within their own culture and system of justice. In such a context, Phil Lancaster suggested a need for resources to be provided to Aboriginal communities for justice initiatives, and that these communities should have discretion in the use of funds and in the distribution of specific justice roles.

By contrast, some of the literature about Aboriginal justice focuses on "needs" in terms of particular kinds of criminal activity, specifically domestic violence, and suggests that there is a need for attention to competing and conflicting goals in community justice. As Evelyn Zellerer argued, it may be difficult to achieve restoration successfully in a context where both gender and culture are taken into account; care must be taken to ensure that family networks and power structures do not perpetuate the victimization of women. Others have suggested a need for caution in expecting or assuming communities to have the interest and/or expertise to respond, treat and control offenders convicted of acts involving serious violence and sexual assault. Thus, while there may be substantial consensus that the "needs" of Aboriginal accused can be met more effectively within a holistic Aboriginal justice system, the "needs" of victims of violence may require careful attention to underlying values within traditional processes of Aboriginal justice.

ii) the "needs" of offenders: The National Council of Welfare's report, *Justice and the Poor*, suggested that the Canadian criminal justice system is not only unjust but also an abysmal failure that pushes young people into crime instead of helping them to stay out of it. The literature includes a wide range of studies about connections between crime and unemployment, and relationships between crime, broken families and histories of abuse. These studies suggest that large numbers of young people, especially young men, may engage in activities which violate the law, and many of them are likely to have little familial support (and even a history of familial abuse) as well as no job or much prospect of obtaining employment. In such a context, it is easy to conclude that traditional criminal justice processes may not respond appropriately to the "needs" of these accused; in this context, the alternative of restorative justice is examined in more detail in chapter 3. At this point, however, there are three general issues to be addressed.

One is the differential enforcement in Canada of youth and street crime on one hand, and white-collar crime on the other. According to the National Council of Welfare, white collar criminals are responsible for more deaths and steal much more money than the poor, but are seldom called criminals. Its study recommended equality of treatment, and special arrangements to ensure that poverty did not contribute to the perpetuation of criminal activity. The second issue is the connection between "needs" of accused persons and the definition of criminal activity itself. As Ron Levi argued, zero tolerance policies and other "get tough" measures mean that youth are often brought before the criminal justice system for activity that should be dealt with otherwise. The National Council of Welfare has also noted the relationship between ratios of police officers and population figures in different areas, and how increasing the number of police in some communities has resulted in immediate "crime waves". As well, recent legislation such as Ontario's *Safe Streets Act* increases the number of accused persons charged with criminal offences; and the prohibition of activities in public, such as drinking or loitering, may result in criminality among the poor. In this way, it is arguably important to re-examine the kinds of activities which are labelled "criminal", rather than simply responding to current definitions.

The third issue is the characteristics of offenders, including their gender and race. Disproportionately, many more offenders are male rather than female. Even though some recent studies have demonstrated an increase in the rate of criminality among women, it appears that they are still much less likely to be involved in criminal activity than are males. Indeed, women who are prisoners appear to be generally poor, young, white, and single mothers, with few, if any, previous convictions. Many of them have experienced violence and abuse in the past. In addition, research for the *Commission on Systemic Racism in the Ontario Criminal Justice System* revealed a significant over-representation of Blacks among accused in the Ontario criminal justice system. In such a context it is not surprising to find research revealing that members of many racial and ethnic minorities in Canada have strong perceptions that they are discriminated against by the criminal justice system. In this way, problems within the criminal justice system are often linked to broader concerns about racial discrimination and issues of economic poverty and social justice. Thus, broader approaches to criminal activity reveal how "needs" of offenders may encompass matters that go beyond individual acts of criminal offences, revealing the interrelationship of issues of poverty, gender and race in the definition of criminal activity.

iii) the "needs" of victims and communities: As explained earlier, there has been a marked increase in recognition of the "needs" of victims in the criminal justice system in recent decades. In the 1980s and 1990s, there have been numerous studies about the "needs" of victims and proposals for alternatives to criminal courts for meeting these needs. Indeed, the inability of the criminal justice system to meet the "needs" of victims is the basis of many developments in restorative justice, in which offenders can be held (more) accountable for their actions. Some commentators have also suggested that victim offender mediation, for example, can better respond not only to the needs of victims, but also more appropriately to the needs of *all* involved.

Restorative justice approaches are, of course, related to other measures to meet victims' "needs". Thus, for example, requirements for counsel to ensure the participation of victims and other similar measures in traditional criminal processes derive from the same goal of recognizing victims' "needs". Some literature suggests that victims' needs should be considered "rights". There are also studies which seem to suggest that in a number of cases, victims have indicated higher levels of satisfaction with victim offender mediation, rather than with traditional criminal justice processes.

Some of the literature has also identified the benefit of restorative justice practices for communities. Such processes require a balancing of the needs of victims and offenders, as well as their communities. In this context as well, the gender of victims may be an important factor. Thus, in spite of legislation concerning violence against women, the literature suggests a need for a more co-ordinated and integrated approach to reduce and prevent victimization of women. These goals are also reflected in specialized courts which have been adopted in a number of parts of Canada for prosecuting child abuse cases and domestic violence cases. Yet, a number of other studies have revealed the difficulty for some women, particularly those in immigrant communities, to access these special services. Dianne Martin and Janet Mosher have proposed a more complex strategy, one that "neither homogenizes the experiences of abused women, nor denies them the status of rational agents competent to exercise choice in their own best interest," and which recognizes criminal justice intervention as only one of a multitude of services and interventions which may be necessary.

Concerns about the failure of the criminal justice system for women who are victims may also apply to some victims who are members of visible minorities. In this context, of course, differential power relationships within society create social inequality, which may result in economic marginality. In such a context, victim offender mediation processes may in fact reinforce the imbalance of power rather than confronting the offender with the power of the state acting on behalf of the victim. And, as Barbara Hudson has argued, the need for a "community" for restorative justice practices may be unrealizable: "most of us now inhabit not communities, but shifting, temporary alliances which come together on the basis of private prudentialism".

All of these comments reveal the political content of discussions of victims' needs. In fact, the literature suggests that there has been a convergence between those who have drawn attention to the needs of victims, and those, primarily politicians, who want to demonstrate "get tough" policies in relation to crime. David Garland argued, for example, that current punitive policies adopted by governments have been shaped, at least in part, by this linkage with the interests and feelings of victims. In this way, it is arguable that the needs of individual victims have been appropriated, even transformed, by political agendas and rhetoric. Thus, the needs of victims, as well as the needs of offenders in communities (including Aboriginal communities), continue to be both complex and contested in relation to the goals and values of criminal justice in Canada.

Chapter 3 of the paper, "Challenging the Mainstream: Approaches to Increasing Access to Criminal *Justice*," considers approaches to increasing access to criminal justice based on the critique of the mainstream system developed in Chapter 1 and the needs which any approach to access ought to address as argued in Chapter 2. It briefly refers to the broad transformative approach, but focuses on restorative justice as the main approach to increasing access to justice identified in the literature and implemented -- or purportedly implemented -- in practice by governments. It explains that restorative justice is defined not by a particular process but by reference to a set of principles: the assumption that crime is a breach of relationship, rather than an offence against the state; that the goal is to restore the relationship or at times develop a relationship where one did not exist; and that the process of restoration should involve not only the offender, but the victim and relevant communities. This process is directed at bringing home to offenders an understanding of the harm created by their acts and the need to accept responsibility for them, encouraging victims to identify harms they have suffered and to participate in the determination of the appropriate consequences for the offender and involving the community in helping to reintegrate both offender and victim. A major characteristic of restorative justice processes is the notion of "encounter" among those affected by crime.

As Chapter 3 explains, restorative justice has been described as "a revolution in criminal justice" and "a paradigm shift;" yet it argues that it is at least premature to label restorative justice as a form of *transformative* justice. The chapter recognizes that the term restorative justice has been applied to a wide range of initiatives, many of which are better characterized as modifications of the existing system than as reflecting wholesale changes in assumptions or processes. Chapter 3 examines the relationship between restorative justice practices and traditional criminal justice in Canada, indicating that most commentators believe that even an extensive restorative justice system would have to be "backed up" by punishment; other commentators maintain that government should provide the order within which community-based restorative justice approaches could operate. Commentators differ on the extent to which government actors (Crowns or judges, for example) should be involved in restorative justice processes, depending on whether they emphasise the potential in participation by the state for coercion by the state or the necessity of the state's involvement in directing accused and offenders towards these processes. In Canada government restorative justice initiatives are authorized by and must comply with the requirements of "alternative measures" set out in the *Criminal Code* and the *Young Offenders Act* and thus are circumscribed by state-imposed parameters. Some commentators favour restorative processes because in their view they appropriately blur the boundary between the criminal and civil legal systems; other advocates, as well as opponents, however, argue that these two streams of the legal system serve different purposes and should not be confused. While the greater involvement of the victim in criminal processes integral to (but implemented independently of) restorative processes diminishes the gap between the two, the boundary between them is far from dissolved.

Chapter 3 also assesses how restorative justice responds to "needs" of participants in the criminal justice system, suggesting that these processes tend to identify generic needs (victims want to be "empowered" through greater involvement in the process, for example) without addressing needs relating to sex, race or class. The one exception, in intent and appearance, are the aboriginal community initiatives. The Chapter then reviews a number of "piecemeal" initiatives, including conditional sentencing, victim impact statements, lay tribunals, community courts and other similar initiatives. The Chapter suggests that while these may make the system "better" for offenders and victims and may involve the community more than do centralized systems, they do not radically change the system and perhaps more importantly, are not intended to do so whatever the claims of their merits; nevertheless, many of these initiatives are explicitly identified as "restorative justice" approaches in the literature or by those who implement them.

The Chapter explores in greater detail three main restorative justice approaches as they have been discussed in the literature or implemented in Canada and other jurisdictions, particularly the United States, England, Scotland, Australia and New Zealand: victim-offender mediation, (family) conferencing and aboriginal circles. While initially begun as volunteer efforts, and remaining so in some cases, these programs have increasingly been proposed or implemented by governments responding to criticisms about the traditional criminal legal system, sometimes as individual projects, but in other instances as part of a comprehensive program. The three major approaches differ with respect to the participants (sometimes only the victim and the offender in victim-offender mediation, while the offender's family may also be involved in family group conferencing and community members are involving in aboriginal sentencing circles) and their focus (victim-offender mediation is more likely to focus on the victim than is conferencing, for instance). Despite similar nomenclature, family group conferencing (more than the other restorative processes) may differ from jurisdiction to jurisdiction; in Australia, for example, it is based on Braithwaite's "reintegrative shaming" theory. Although more often employed for minor crimes, the three major restorative justice approaches may also be used for crimes as serious as murder or sexual assault. They may be used at different points in the mainstream system, from pre-charge to sentencing. All three approaches require considerable preparation; for example, preferably a mediator will meet with the victim and offender separately before the actual encounter between them and there may be a number of preparatory steps before a sentencing circle takes place. Studies have indicated high levels of victim and offender satisfaction with these approaches, with high levels of agreement and considerably greater likelihood of compliance with the agreements than with court-ordered restitution. As we indicate in Chapter 4, however, a number of criticisms have been leveled at the studies raising doubt about the appropriateness of governments embarking on restorative justice as a solution to the problems with the mainstream criminal justice system when it has not been adequately shown that these programs are either consistent with their own promises or otherwise effective in addressing problems giving rise to and arising from crime.

Thus in Chapter 4, "A Step Back . . . Towards the Future," the paper offers some reflections on restorative justice and its challenges. Recognizing the limits of current criminal justice processes, and the "needs" of criminal justice participants, the paper provides a critical assessment of restorative justice alternatives. It raises concerns about the identity of community, the potential for conflict between victims and communities, whether restorative justice programs are more a form of downloading of government services than an attempt to develop radical new approaches to criminal justice, the relationship between the mainstream criminal system and restorative justice practices and whether restorative justice practices are sufficiently cognizant of structural imbalances of power and the impact of gender, race and class on victims and offenders. As well, the paper identifies directions for further research to enable us to better assess the potential use of restorative justice principles in practice in Canada, with particular emphasis on general evaluation of restorative justice programs and the need to assess programs to determine whether they satisfy equality principles. Ironically, the criticisms raised in the context of discussions about restorative justice primarily fit into two categories: those which are aimed at the principles and practices themselves and those which are directed at forces which threaten to undermine the principles and practices. The two categories come together if one recognizes that the terminology is often applied loosely and the practices often implemented uncritically.

The community is a major element in many restorative justice initiatives, whether piecemeal or more comprehensive programs. The Chapter points to critiques based on the difficulty of identifying "the community" in a pluralist and post-modern age, both terms which, although perhaps contradictory, are said to characterize western contemporary mobile societies. Ironically, although the mainstream system has begun to implement some processes (particularly aboriginal circles) as a way of recognizing "difference," some commentators and jurisdictions have advocated approaches (especially reintegrative shaming) for western jurisdictions, which are premised on the norms of values of non-western societies. More prosaically, other commentators ask how we measure "community harm." Furthermore, the degree to which community initiatives should be monitored by government is a difficult question. On the one hand, government intervention or control may result in the co-optation of restorative justice initiatives, while on the other hand, inadequate monitoring may permit powerful members of the community to control the processes at the expense of vulnerable groups. For some, restorative justice raises the specter of social control as a substitute for state control. Community accountability in the exercise of government programs may also run into conflict with claims of community autonomy, particularly in relation to aboriginal programs which may be intended as part of a move towards self-government. Conflicts may also rise with respect to differing expectations about appropriate behaviour and sanctions between victims and communities or about the extent to which communities take victims' concerns into account; these problems may arise particularly in relation to domestic abuse and sexual assault cases because these are heavily emotive crimes which historically have often resulted in the isolation of victims from their communities, but they are not limited to these kinds of offences.

With increased government interest in these programs, it is inevitable that concerns are raised about whether the programs are more an attempt to download government functions onto local communities than to develop greater access to justice. While this may invoke ideological arguments, it also elicits concerns about whether the downloading or decentralization is accompanied by adequate resources to implement the programs and even if so initially, questions about the stability of the funding. These processes are labour intensive and require heavy expenditure of time, community education and adequate training for mediators and facilitators; they therefore require significant resources if they are to be effective, particularly as an alternative approach to justice. The allocation of resources raises another issue: to what extent are the resources merely being transferred from social programs, without which it is believed youth and marginalized adults are more likely to engage in crime and thus enter the criminal legal system.

Commentators also suggest a related problem: that the emphasis on individual participants privatizes crime, ignoring the systemic impact of crime and the systemic reasons for crime. These approaches ignore or treat as subsidiary the importance of the *state's* condemnation of certain activities by labeling them criminal and treats them more as a dispute between the victim and the offender;

restorative justice, in its purported sensitivity to the individual offender and victim, often fails to acknowledge broader social concerns underlying the status and experience of victims and offenders, the offence itself or the sanctions or reparations ordered. Restorative justice, therefore, has been described as apolitical, failing to take into account or respond to structural inequality. Other commentators argue, however, that restorative justice initiatives which are informed by "social movement politics" may address some of these problems or indeed, that restorative notions can be taken beyond the justice system and incorporated into governance models. To the extent that restorative justice answers problems identified with the mainstream criminal legal system, there are concerns about whether restorative justice initiatives will be distorted by incorporation into the mainstream system and the appropriate relationship between the mainstream system and restorative justice initiatives remains to be delineated. While the mainstream system is subject to criticism because of ill treatment of offenders, for example, restorative justice approaches, based on informal procedures, seem to lack even what some would consider the doubtful protection offered by the formal rules marking the mainstream system. Indeed, offenders who fail to conform to agreements and conditions may be imprisoned when they otherwise would not have been, the phenomenon known as "widening the net." Finally, with the spread of purportedly restorative justice programs, some advocates have expressed a fear that adherence to the principles underlying restorative justice will become perfunctory or offenders will learn to "abuse" these processes to their own ends.

Chapter 4 also speaks to "future directions," identifying the need for more adequate studies to determine the effectiveness of restorative justice initiatives in responding to crime, using measures consistent with the principles underlying these approaches. It is necessary to establish, for example, the long term impact on offenders (is recidivism only delayed, as some studies have shown?) and victims (have their attitudes towards crime and themselves changed?), to establish more definitively whether these programs result in net-widening and whether they adequately respond to equality postulates, an issue not usually addressed in the studies of restorative justice programs. The Chapter suggests three specific studies relating to equality concerns: an ethnographic study of the application of restorative justice practices in Aboriginal communities, a project to assess the gender implications of restorative justice and a study assessing the impact of privatization of justice on offenders.

Chapter 5 briefly concludes that currently, "restorative approaches are for the most part too intertwined with the mainstream legal system on the one hand, and pose [sufficiently] serious challenges themselves, on the other, to treat them as either a paradigm shift or a panacea." It recommends that there be greater understanding of both the benefits and problems associated with restorative justice before governments invest heavily in these approaches at the expense of other ways of enhancing access to criminal justice.

PREAMBLE

In March 2000, the Deputy Minister and Attorney General of Canada hosted a one-day symposium on access to justice, titled *Expanding Horizons: Rethinking Access to Justice in Canada.* Based on the vision of Andrée Delagrave, Director General, Policy, Integration and Coordination Section, Department of Justice Canada and organized by the Access to Justice Team, Research and Statistics Division, the purpose of the Symposium was to explore new directions and identify emerging challenges for assuring access to justice for Canadians in an increasingly complex and demanding environment. As the Deputy Minister notes in the preface of the Symposium report, "we need to explore how the traditional justice system can adapt to change, develop effective partnerships, and find real solutions that respond to the needs of victims, offenders, communities and all affected by the justice system."

Approximately 100 people from across the country attended the Symposium, including members of the judiciary, representatives from the Law Commission, officials from the highest ranks of the police, justice service practitioners, and leading thinkers from outside the justice domain. The symposium left all participants with one resounding message, quite remarkably, from a large group of leading thinkers from within the justice system and from other areas of human endeavor. The key message was not so much that the justice system – both civil and criminal justice, but especially the criminal justice system – does not work. On that issue there *was* overwhelming agreement. The truly surprising message that emanated forcefully from this extraordinary conversation was that there is a tremendous appetite for change among leaders from both inside and outside the justice system.

The Symposium did not produce a recipe for change, however it produced a strong endorsement for experimentation – and to get on with the job of exploring options for change forthwith – and a set of themes that can act as guideposts toward innovative and more accessible forms of justice. The following list provides a glimpse of these guideposts.

1. Meeting needs in equally important as protecting rights;
2. Justice is achieved when a solution is reached that satisfies all affected parties;
3. Access to the courts is *not* the same as access to justice;

4. Restorative justice ("the symbolic term that became the focus [of] dissatisfaction with the present justice system") should be considered;
5. "One size does not fit all"; and
6. [There is a need for] sharing power and resources.

As other observers have noted, the current criminal justice system is criticized by both victims and offenders, as well as by the police and communities in general; there is skepticism about the fairness and effectiveness of Canada's justice system, and for particular groups (especially aboriginal peoples) criminal justice processes signify a manifest failure of the Canadian state (Cooper and Chatterjee in Canadian Institute for the Administration of Justice 1999: 3-4). For those who attended the Symposium, there was a sense that access to justice has focused too much on *access* to justice and too little on the quality of *justice* itself. Thus, participants at the Symposium suggested that holistic approaches to access to justice offered methods for problem-solving that replace "both the traditional concepts of justice and the formal mechanisms to attain access to justice" (Currie 2000: 17).

This report is part of the Research and Statistics Division's commitment to further explore the results of the Deputy Minister's symposium on access to justice and identify key issues that relate to this important policy area. The goal of this paper is to situate the results of the Symposium within the broader access to justice literature. In particular, it provides a critical review of current literature about criminal justice and the challenges of "new justice" initiatives in Canada, with some comparisons to other jurisdictions including Great Britain, the United States, Australia and New Zealand. The paper includes four parts. Chapter 1 describes the conceptual framework for a review of issues about access to criminal justice in Canadian society (including theme #3 above). Chapter 2 focuses on "needs" in the criminal justice context: needs of aboriginal peoples, offenders, victims and communities in Canada (including themes #1 and #5 above). Chapter 3 discusses the literature about restorative justice and a number of projects based on restorative justice principles (including themes #2, #4 and #6 above). In Chapter 4, the paper steps back to provide a critique of some of the issues, identifying gaps in the literature and future directions for research.

In addition to this report and the Symposium proceedings (*Expanding Horizons: Rethinking Access to Justice in Canada*) the Research and Statistics Division has produced several other documents that highlight emerging issues within the access to justice realm. The Division has published the results of its one-day symposium on conditional sentencing (*The Changing Face of Conditional Sentencing*), co-hosted with the Faculty of Law and Faculty of Social Sciences, University of Ottawa, as well as a report on the effects of restorative justice programming (Latimer, 2000). Ab Currie's report (2000) examines the evolution of access to criminal justice and how adopting restorative justice approaches might make the delivery of criminal legal aid an integral part of a more modern concept of access to justice. It is the Division's hope that these documents, as well as some of our other publications will make a solid contribution to emerging policy discussions within the access to justice field.

1 THE CONTEXT AND CONCEPTS OF CRIMINAL JUSTICE: FROM *ACCESS* TO JUSTICE TO ACCESS TO *JUSTICE*

1.1 Introduction

> ... But I know of no way of assessing to what extent "justice" was done in a sample of cases whether civil or criminal. The question is too elusive, too complex to unravel. It would require knowledge of too many unknowable facts. The concept of justice in legal cases I suspect is too deep for any research project (Zander 2000: 2).

Professor Zander's comments at the beginning of the Hamlyn Lectures in 1999 suggest a need for caution in discussions about the meaning and processes of justice. Describing himself as "an academic lawyer who for many years has been a student of the workings of the legal system and in particular of the system's pathology," Zander examined recent changes in civil justice, criminal justice, and the protection of human rights in the United Kingdom. Although his lectures focused on the legal system and the courts rather than on more fundamental ideas of "justice," he offered a trenchant critique of the new *Access to Justice Act*, 1999 in the UK and its potential to undermine the accomplishments of the *Legal Aid Act, 1949*, enacted fifty years earlier. In spite of the title of the 1999 legislation, Zander concluded that the *Access to Justice Act* heralded major restrictions on access to justice. As he stated bluntly:

> The truth is that the [1999] reforms spring not from a desire to improve access to justice but from the Treasury's need to control the budget. The entire new system flows from the decision to cap the budget. This will infect the whole enterprise.... (Zander 2000: 24).

Zander's comments reveal the complex social, political and legal contexts within which current discussions about justice occur. Although he confined his comments to the legal system and the courts in the United Kingdom, and the extent of access to existing legal proceedings, Zander's analysis demonstrates how political goals of limited spending may affect the definition of access to justice goals and their achievement in both courts and other legal contexts.[1] As he suggested, definitions of access to justice in the legal context may have important consequences for social justice as well. Beyond the context of courts and legal proceedings, moreover, Zander's insights about how social and political contexts shape ideas about access to justice are important in assessing current efforts in Canada to envisage justice as "transformative" (Law Commission of Canada 1999).

This chapter provides an overview of some aspects of the context and concepts for this re-thinking of access to justice. It focuses on the challenges identified in the literature about how to seek justice in Canada, rather than merely improving access to current legal processes: that is, how to promote *justice* rather than merely enable better *access to the legal system*. The chapter focuses on three aspects of this analysis:

1. the context of access to justice developments, including the relationship between civil and criminal justice, and recent initiatives in criminal justice;
2. the public/private dimensions of justice, including issues about resources, capacities, and power; and
3. the concept of equality in promoting social justice.

1.2 The Context of Recent Access to Justice Developments

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[1] In his lecture on criminal justice in the UK, Zander began by noting that Home Office figures for 1999 revealed that of 100 offences committed against individuals and their property, only 45 get reported to the police, 24 are recorded by the police, five are cleared up by the police, and two result in a conviction. As he concluded, "the criminal courts touch only the fringes of the problem of crime" (Zander 2000: 51). The lecture provided analysis of recommendations of the Runciman Royal Commission and other recent "improvements" in criminal justice, all "indications of a concern regarding at least the appearance of justice. But knowing how to improve the *quality* of justice is much more difficult" (Zander 2000: 55). For Zander, economy and efficiency are important goals for the criminal justice system, but the primary concern must be "the right balance between the proper interests of the prosecution and the proper interests of the defence" (Zander 2000: 75).

Ideas about access to justice in Canada have been significantly influenced by the work of the Florence Access-to-Justice Project, a comparative assessment of initiatives worldwide, which has contributed to more broadly-based conceptions of access to justice (Cappelletti and Garth 1978; Cappelletti and Weisner 1978 and 1979; and Cappelletti and Garth 1979). According to Cappelletti and Garth, there were three "waves" of access to justice reforms: the "first wave" of the movement involved provisions for legal aid; the "second wave" was a group of substantive and procedural reforms which enabled legal representation for more "diffuse" interests including environmental and consumer protection. By contrast, the "third wave" was labelled by Cappelletti and Garth as the "access to justice" approach because of its aspirations to attack barriers more articulately and comprehensively; in their 1978 article in the *Buffalo Law Review*, they described the "third wave" as building upon the achievements of earlier reforms, but expanding both the goals and the means of achieving them:

> This "third wave" of reform includes but goes *beyond advocacy*, whether inside or outside of the courts, and whether through governmental or private advocates. Its focus is on the full panoply of institutions and devices, personnel and procedures, used to process, and even prevent, disputes in modern society (Cappelletti and Garth 1978: 223).
>
> [The "third wave" encourages experimentation with a wide range of reforms,] including changes in forms of procedure, changes in the structure of courts or the creation of new courts, the use of lay persons and paraprofessionals both on the bench and in the bar, modifications in the substantive law designed to avoid disputes or to facilitate their resolution, and the use of private or informal dispute resolution mechanisms (Cappelletti and Garth 1978: 225).

Although the focus of the Florence Access-to-Justice Project was civil justice, it is possible to identify similar "waves" of developments in the criminal justice context. Thus, recent decades have witnessed "first wave" changes to make legal representation of accused persons more effective (such as legal aid for accused persons); as well as "second wave" changes which have provided improvements to criminal trials (such as requirements of prosecutorial disclosure), a broader range of sentencing options (such as formal cautions and conditional sentences), and some recognition of the impact of criminal activity on victims and communities (such as victim impact statements) (Crawford in Young and Wall, eds. 1996; Roberts and Cole, eds. 1999). In such a context, recent developments in restorative justice for criminal law matters appear to be "third wave" reforms: efforts to use the "full panoply of institutions, devices, personnel and procedures" and experimentation with a wide range of reforms.[2] Moreover, beyond criminal justice, it has been suggested that there is "the possibility of using the substance of conflict as a means of exploring options and establishing responses that are not only acceptable to all parties but develop and strengthen relationships among those involved" in other kinds of conflict (Law Commission of Canada 1999: 40).[3] From this perspective, new developments in restorative justice in the criminal law context appear linked to "transformative justice" - processes which take account of broader concerns, including traditional civil law matters. In this way, the early insights of the Florence Access-to-Justice Project are connected to new developments in both criminal and civil justice.

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[2] Albert Eglash is credited with creating the term "restorative justice" in 1977, although restorative conceptions of justice "claim their roots in both Western and non-Western traditions" (Llewellyn and Howse 1998: 4-5). Llewellyn and Howse adopted the analysis of Van Ness and Strong that restorative justice theory was influenced by five movements: the informal justice movement; movements to meet the needs of victims through restitution; the victim's rights movement, enabling victims to participate in legal processes; movements to adopt victim-offender mediation and family group conferencing; and social justice movements (Van Ness and Strong 1997). According to Llewellyn and Howse:

> Restorative justice is fundamentally concerned with restoring social relationships, with establishing or re-establishing social equality in relationships - that is, relationships in which each person's rights to equal dignity, concern and respect are satisfied. As it is concerned with social equality, restorative justice inherently demands one attend to the nature of relationships between individuals, groups and communities (Llewellyn and Howse 1998: 11).

[3] According to the LCC Discussion Paper, "Transformative justice, as a general strategy for responding to conflicts, takes the principles and practices of restorative justice beyond the criminal justice system" to environmental

1.2.1 The context of civil and criminal justice

This analysis of access to justice initiatives in civil law and criminal law contexts suggests a need to reassess the continuing validity of distinctions between these categories. To what extent should we theorize criminal law and civil law as two quite separate categories of justice responses - or is it more appropriate to think of them as points on a continuum? This question is critical to any assessment of new developments in civil law and criminal law for settling disputes. One response is that actions should be characterized as "criminal" (1) when they involve socially proscribed wrongdoing, that is, when the conduct is such that the community should take a shared and public view, and claim normativity over its members; and (2) when there is someone who is a wrongdoer, a criminal agent, who can be held responsible, that is, who can be called by the community to answer for that wrong (Marshall and Duff 1998). Using this approach, there is a crucial distinction in the processes used to respond to criminal, by contrast with civil, wrongs. In the civil process, the victim is in charge; by contrast,

> A "criminal" model puts the community (the state) in charge. The case is investigated by the police; the charge is brought by [the state]; whether it is brought, and how far it

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disputes, labour matters, landlord-tenant issues, etc:

Taking a cue from restorative justice, a transformative approach to dispute resolution would begin with a commitment to transforming the relationships between parties to the conflict .... A transformative approach to conflict resolution would encourage accommodative relationships between groups with competing interests. The conflict situation would be transformed from one in which groups are in competition with one another to one in which groups recognise their mutual interests in arriving at workable solutions (Law Commission of Canada 1999: 39).

> proceeds, is up to the prosecuting authority; it is not for the victim to decide whether any decision it produces is enforced.... [There] are two aspects to the criminal model. On the one hand, the victim receives more support from the community than she might under the civil model: she is not left to bring the case by herself. But, on the other hand, she loses control of it: it is no longer hers to pursue or not as she sees fit (Marshall and Duff 1998: 15-16).

Using the concrete example of rape, Marshall and Duff argued that the wrong done to the victim should be regarded, at the same time, as a wrong done to "us". That is, all members of the community share the wrong:

> The wrong does not cease to be "her" wrong: but it is also "our" wrong insofar as we identify ourselves with her. The point is not just that we realise that other members of the group are also vulnerable to such attacks, or that we want to warn other potential assailants that they cannot attack members of the group with impunity...: it is that the attack on this individual victim is itself also an attack on us - on her as a member of the group and on us as fellow members (Marshall and Duff 1998: 19-20).

For Marshall and Duff, it is not appropriate to assert that the community has "stolen" the victim's case; they disagree with Nils Christie's classic argument that a victim is rendered mute in criminal proceedings, "reduced to the triggerer-off of the whole thing" (Christie in von Hirsch and Ashworth, eds. 1998: 312). Yet, to the extent that ideas of restorative justice create opportunities for greater involvement by victims in criminal justice processes, and more substantial connection between victims and offenders, it is important at the outset to understand how these developments tend to blur existing distinctions between criminal and civil law processes.[4]

This conclusion does not mean that there will no longer be distinctions between "private" and "public" harms, but it does reveal the necessity for careful attention to the details of the processes[5] designed to promote greater access to justice. Moreover, as will be explored more fully later in this paper, the choice of different examples may affect our conclusions about whether justice goals are achieved. For example, it may be relevant that the rape example used by Marshall and Duff in their analysis of criminal justice processes involves a victim who is female. By contrast, in Christie's analysis of societal conflicts, the pronoun used for the victim is generally male: Christie described the victim in terms of how "he [has] suffered, lost materially, or become hurt," and how "above all he has lost participation in his own case" (Christie in von Hirsch and Ashworth, eds. 1998: 314). Whether, and to what extent, gender may be relevant in assessments of traditional criminal justice or restorative justice practices[6] are questions addressed later in this paper.

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[4] In a review of criminal law reforms in the decade after the 1983 *Report of the Federal-Provincial Task Force on Justice for Victims of Crime* (which recommended amendments to the Criminal Code to permit the introduction of victim impact statements in relation to sentencing), Steven Skurka examined the questions included on the forms used for such statements in different Ontario cities. Skurka cautioned that courts must "prevent an infusion of unwarranted prejudice and ... keep victim impact evidence within the strict parameters ... legislatively mandated" (Skurka 1993: 346). See also the response to Skurka's concerns in Young 1993: 355.

[5] See also Etherington, *Review of Multiculturalism and Justice Issues: A Framework for Addressing Reform* (Ottawa: Dept. of Justice Research Section, 1994) 83-84: "The criminal justice system does not exist in isolation and many of the barriers to access to justice faced by minorities originate in institutions which are generally perceived to

1.2.2 The context of goals for criminal justice, punishment, and sentencing

The literature on criminal justice reflects differing perspectives on the goals of criminal justice, perspectives which are important for understanding the context in which current claims for restorative justice are presented. One significant (now classic) analysis of criminal procedure in the trial context was enunciated by Herbert Packer in 1964: the competing models of "crime control" and "due process" (Packer 1964). Packer's model sought to identify the spectrum of policy choices in the criminal process: according to Packer, the crime control model favoured efficient, unhindered decision-making to achieve the dominant goal of repressing crime, while the due process model provided greater protection for an individual accused by limiting and constraining official power (see also Packer 1968). As early as 1970, however, John Griffiths suggested that both of Packer's models represented different forms of the same model, a "battle model" of criminal justice, and Griffiths then went on to formulate a "family model" of criminal justice. According to Griffiths, the "family model" recognized explicitly that criminal activity means that an individual has violated a

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be extrinsic to the criminal justice system."

[6] See also Laureen Snider, "Feminism, Punishment and the Potential of Empowerment" (1994), 9 *Canadian Journal of Law and Society* 75; and Naomi Cahn "Policing Women: Moral Arguments and the Dilemma of Criminalization" (2000), 49 *DePaul Law Review* 817.

community-defined norm, but that the violation should not therefore result in demonizing the individual as a "criminal;" rather, a family model of criminal justice focuses on "what the *nature* of the process accomplishes as well as with the process' fitness to achieve its *object*" (Griffiths 1970: 391).

As Kent Roach has argued, Packer's efforts to promote a model of due process was significantly limited when later empirical research demonstrated that "in most cases, the criminal process operates as a crime-control assembly line culminating in the guilty plea" (Roach 1999: 21, quoting McBarnet.)[7] As well, Roach argued that due process may actually operate at the level of ideology to provide support for a model of crime control. Moreover, Packer's models presupposed that interests of individuals were always opposed to those of the state; by contrast, Roach suggested that Griffiths' family model "assumed that the state and the accused, like a parent and child, had common interests if only because they continued to live together after punishment (Roach 1999: 25). Significantly, Roach went on to state that the family model, used most often in juvenile justice, was later discounted because of concerns about both due process and crime control; however, he suggested that it is now "being reconceived through family conferencing, restorative justice, and reintegrative shaming (Roach 1999: 25, quoting Braithwaite 1989). As well, Roach noted that both Packer and Griffiths were writing before the rise in concerns about victims' rights, a development which has had a significant impact on processes now being used in the context of both traditional and restorative justice initiatives. In this way, some current practices of restorative justice appear to be linked to earlier debates about appropriate models for criminal justice.[8]

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[7] See also statistics that 90 percent of Criminal Code violations that come to the attention of the police are non-violent: National Council of Welfare, *Legal Aid and the Poor* (Ottawa: Min. of Supply and Services, 1995) at 3-4. The *Toronto Star* recently reported that "Between 70 per cent and 80 per cent of tens of thousands of cases in Toronto's provincial courts each year are plea bargained - an increase of 10 per cent over the past decade .... The provincial court system would grind to a halt without plea bargains." See "Closed Doors: Justice by Plea Bargain," *Toronto Star* 10 March 2001, at A1 and A26.

[8] According to Braithwaite, imprisonment was initially seen as a "civilizing" enterprise, systematic and rational. He also asserts that "prior to the 1970's, the crime debate had been much more about finding constructive prevention strategies than about punishment," but that "subsequently the experts' focus has been on methods of determining the appropriate penalty for wrongdoing..." (Braithwaite 1999: 1737).

In addition to differences in theoretical approaches to criminal justice procedures, there are also differing theories of punishment and sentencing. Von Hirsch and Ashworth have suggested that during the first six decades of the twentieth century, "rehabilitation was supposed to be an important aim of sentencing. Sometimes, it was said to be the *primary* aim" (von Hirsch in von Hirsch and Ashworth, eds. 1998: 1). In addition to rehabilitation, however, deterrence goals were also emphasized in relation to sentencing, with the objectives of both deterring individual offenders from reoffending (specific deterrence), and also deterring other citizens who might be tempted to commit crime out of fear of the penalty (general deterrence). Goals of rehabilitation and deterrence share the idea that "punishment is warranted by reference to its crime-preventive consequences" (von Hirsch in von Hirsch and Ashworth, eds. 1998: 44); in this way, they are "forward-looking" theories of punishment. By contrast, since the 1970's, some sentencing theorists have embraced the idea of "just deserts" as the basis for punishment: the idea that "the seriousness of crimes should, on grounds of justice, be the chief determinant of the quantum of punishment" (Ashworth in von Hirsch and Ashworth, eds. 1998: 141). This approach assumes that it is possible to order the seriousness of crimes, and that it is the crime committed, not the offender's need for rehabilitation or deterrence, which should determine the nature of punishment; that is, there should be proportionality so that "the amount of punishment must reflect the degree of harm committed" (Roberts and Cole in Roberts and Cole, eds. 1999: 10). In addition, unlike goals of rehabilitation and deterrence, which take account of the future actions or motives of the offender (and others), the "just deserts" theory of sentencing focuses on the offender's criminal action in the past. Proponents of the "just deserts" theory of sentencing have argued that it conforms to "everyday conceptions of crime and punishment" and that it is closely linked to liberal political theory with its insistence on limiting state power and its conception of autonomous individuals who exercise choices (Ashworth in von Hirsch and Ashworth, eds. 1998: 148).[9]

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[9] In their edited collection, *Reform and Punishment*, Michael Tonry and Franklin Zimring addressed a number of issues about sentencing reforms. For example, Louis Schwartz analysed options for sentencing guidelines, suggesting that the objective of short prison sentences is deterrence; the objective of medium lengths of imprisonment is rehabilitation; and the goals of lengthy periods of imprisonment are retribution and incapacitation: see Schwartz "Options in Constructing a Sentencing System: Sentencing Guidelines under Legislative or Judicial Hegemony" in Tonry and Zimring, eds., 1983: 71. As well, John Coffee and Michael Tonry assessed research about the impact of sentencing guidelines, particularly in relation to plea bargaining: see John Coffee, Jr. and Michael Tonry "Hard Choices: Critical Trade-Offs in the Implementation of Sentencing Reform through Guidelines" in

At the same time, however, others have suggested that a theory of "just deserts" sentencing in an otherwise "unjust society" increases punishment for those who are least able to conform to the ideal of autonomous individuals exercising free choices:

> These very robust notions of free will and choice seem far from the mark when one considers the people who fill our courts. Women shoplifting groceries or not declaring to the social service authorities their earnings from early morning cleaning jobs; young burglars who have never had the chance of a job; young mothers who turn a blind eye to the provenance of the money these young men give them to provide for their children; even the joyriders for whom performing in a car may be the only free source of excitement and esteem - the offences may be dangerous, over-prevalent and may destroy the quality of life for their victims, but it is difficult to imagine the perpetrators as making positive, unconstrained choices to be criminal. If given a choice between a "real job" and crime, the majority would undoubtedly take the job (Hudson in von Hirsch and Ashworth, eds. 1998: 206-207).

Tonry and Zimring, eds., 1983: 155. The collection also focuses on sentencing of offenders who are mentally ill: see Norval Morris "Sentencing for the Mentally Ill" in Tonry and Zimring, eds. 1983: 125. See also Patti Bregman "Special Legal Needs of People with Mental Disabilities" in McCamus, Ontario Legal Aid Review 1997: 373. See also Andrew Ashworth and Martin Wasik, eds., *Fundamentals of Sentencing Theory* (Oxford: Clarendon Press, 1998); and Richard Young and David Wall, eds., *Access to Criminal Justice: Legal Aid, Lawyers and the Defence of Liberty* (London: Blackstone Press, 1996).

Such a view raises questions about the extent to which the "just deserts" theory of punishment fails to acknowledge sufficiently the extent to which crime and punishment - and the process of defining and processing those who commit crimes - have political and social dimensions, not just legal definitions. As Cappelletti and Garth concluded in their earlier study of access to justice, "a real understanding of access to justice ... cannot avoid some political perspective" (Cappelletti and Garth 1981: xvi). Thus, in attempting to shape appropriate ways of responding to the challenge of ensuring access to justice now, it is arguable that we need to take account of current trends to increase criminalization (Young in McCamus, Ontario Legal Aid Review 1997: 666), especially for the poor: panhandlers, squeegee kids, homeless persons (Sossin 1996: 623), welfare mothers (Cahn 2000: 817), and poor families (Vreeland 2000: 1053). To what extent do principles and processes of restorative justice respond to these kinds of "criminal" activities? How will new sentencing options such as conditional sentencing affect actual rates of incarceration or public perceptions of rates of criminal activity? As Doob argued in a related context, if only aboriginal offenders with ties to a community can access sentencing circles: "what does this mean for the offender who is simply a visitor in the community? Do visitors automatically deserve harsher sentences than those offenders who have ties to the community?" (Doob in Roberts and Cole, eds. 1999: 353). Although the concept of community has been recognized as broader than geography,[10] its scope nonetheless remains somewhat discretionary. Overall, therefore it is hard to disagree with the assertion that ideas about crime and punishment are complex, requiring difficult decisions of public policy (Doob in Roberts and Cole, eds., 1999: 350).

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[10] In this context, Judge Barry Stuart, a pioneer in the use of circle sentencing in the Yukon, has stated that "A community is not a place, it is people." See B. Stuart, *Building Community Justice Partnerships: Community Peacemaking Circles* (Ottawa: Aboriginal Justice Learning Network, Justice Canada, 1997). In a review of circle sentencing practices, Luke McNamara cited cases in which aboriginal offenders' requests for circle sentencing were met even though they were not living in aboriginal communities: see *R v. SEH* [1993] BCJ 2967, Stromberg - Sterin, J; and *R v. Cheekinew* (1993), 80 CCC (3d) 143, Grotsky, J. See Luke McNamara "The Locus of Decision-Making Authority in Circle Sentencing: The Significance of Criteria and Guidelines" (2000), 18 *Windsor Yearbook of Access to Justice* 60.

According to Cooper and Chatterjee, the current criminal justice system in Canada is still premised on the idea of punishment for wrongdoing, and a variety of justifications have been suggested: deterrence, maintenance of the social order, reinforcement of state or societal values, denunciation, the promotion of public safety, the need to remove the individual from society for a period of time, rehabilitation, social control, retribution, and ensuring that the offender knows that he or she has done wrong (Cooper and Chatterjee in Canadian Institute for the Administration of Justice 1999: 2). This traditional approach to criminal justice is significantly different from the concept of restorative justice, which assumes that wrongdoing reflects disassociation with the community, and that the appropriate response is to try to reintegrate the offender into the community by re-establishing a positive relationship. According to Braithwaite, imprisonment has a negative impact on offenders: prisoners not already immersed in a criminal sub-culture or versed in criminal skills are introduced to both during terms of imprisonment, and they may become embittered or angry, give in to feelings of despair, and find themselves distinctly disadvantaged in finding employment after they are released. As a result, imprisonment does not result in the internalization of appropriate community-centred norms (Braithwaite 1999: 1739). In this context, Cooper and Chatterjee identified a need for a new kind of justice, one that offers:

> ... fair, insightful and respectful participation of and treatment to all stakeholders that *maximally benefits and satisfies* the people in communities. Justice in this paradigm is no longer synonymous with loss or pain inflicted by the state. [Restorative justice] measures success [of the justice system] differently; rather than how much punishment has been inflicted, it measures how much harm has been repaired and prevented (Cooper and Chatterjee 1999: 4; citing Van Ness and Strong 1997: 42).

A restorative justice approach thus recognizes a relationship between offenders and the societal context in which they offend; as John Braithwaite argued, the traditional emphasis on punishment in response to wrongdoing represents "a failure of imagination" (Braithwaite 1999). He supports a return to the period prior to the 1970's when the crime debate focused more on prevention strategies than punishment, and a search for solutions which reduce "hurt" to individuals and their communities; these approaches are more likely to aid in crime prevention. Braithwaite asserts that strategies of restorative justice (circle sentencing, family conferencing, and victim/offender mediation) are designed to provide "reassurance" to communities in relation to the commission of criminal acts. This emphasis on justice that "restores" offenders, their victims, and communities (Llewellyn and Howse 1998) thus offers a solution to those who believe that the greatest failure of Canada's criminal justice system has been its persistent and fruitless use of imprisonment as an instrument to deal with criminal behaviour (Quigley in Canadian Institute for the Administration of Justice 1999).

1.2.3 The context of restorative justice in Canada

Restorative justice featured prominently in proposals to reform the criminal justice system in the last decades of the twentieth century, both in Canada and elsewhere. At the same time, proponents of restorative justice practices have claimed that they represent a return to much earlier conceptions of crime and criminal processes, particularly processes for more significantly involving the victim. Thus, Martin Wright explained how victims may have fared better in the Middle Ages, when they were more directly involved in the process with the offender; as well, victims were entitled to receive specific compensation (the "bót") from the offender, while the King or other lords might claim the "wer" or "wite" (Wright 1996: 11-19). In later centuries, with the centralization of criminal law processes, the state's increasingly central role in prosecuting offenders for their criminal activity substantially limited the victim's role in relation to both conviction and sentencing of the offender (Christie in von Hirsch and Ashworth eds. 1998: 312). As a result, many of those who support restorative justice as a means of achieving the goal of greater victim involvement in the process and victim entitlement to restitution characterize restorative justice as a more recent manifestation of earlier forms of English justice (Llewelyn and Howse 1998). Proponents also point to comparative law; for example, the French *Civil Code* has long permitted victims to join their tort action against an offender to the state's criminal action. Although this approach limits the victim's participation in theory to issues of restitution, it has been suggested that the procedure allows victims to participate in all critical stages (Waller 1988: 11, citing Vouin 1973).[11]

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[11] See also Waller's comprehensive list of earlier Canadian reports about participation by victims in criminal processes. See also the report of the Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach* (Ottawa: Min of Supply and Services, 1987).

Another strand of restorative justice characterizes the commission of crime in terms of interpersonal or community conflict, so that the goal of restorative justice is the resolution of the conflict. In such a context, the consent of victims, offenders and community members to engage in discussion to find a solution to the conflict clearly operates to bind all of the participants to the outcome; restorative justice proponents often link goals of non-recidivism to the use of these procedures which operate by consent rather than (as in the traditional criminal law context) by coercion. In using mediation and negotiation to resolve disputes, rather than traditional criminal law processes, restorative justice provides opportunities for participation and empowerment for those involved in criminal law, just as alternatives to traditional civil law disputes may similarly provide opportunities for parties to engage in more consensual problem-solving.[12] Clearly, the use of methods of dispute resolution outside the court system illustrate additional connections between civil law and criminal law processes, although they may also raise questions in these differing contexts.[13] As well, restorative justice procedures also frequently involve arrangements for providing ongoing support to both offenders and victims, using measures that might have been adopted in earlier decades of the twentieth century to achieve rehabilitative sentencing goals.

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[12] According to the Law Commission of Canada's Discussion Paper, "the framework and principles of what is called alternative dispute resolution suggest that many of the concerns expressed by victims and offenders about the criminal justice process have parallels in the civil justice system": see Law Commission of Canada 1999: 37.

[13] As the Law Commission of Canada's Discussion Paper explained, the role of community might be quite significant in environmental disputes, but much less clear in disputes about bankruptcy or family law: see Law Commission of Canada 1999: 38.

This analysis suggests that ideas about restorative justice are not wholly new to debates about crime, punishment and access to justice. In considering its current manifestations, therefore, it may be important to understand restorative justice within its historical context. Moreover, the term "restorative justice" may be used to encompass a variety of practices, including arrangements which provide for victim participation, community involvement in dispute resolution, rehabilitative goals, restitution, etc. - but not necessarily all of these features in any one process. In this way, there is a need to consider the social and legal context within which particular restorative justice programmes operate, and the precise consequences of the blurring of boundaries between processes of criminal and civil justice in individual cases. In addition, the cultural context of restorative justice is critical. That is, it is important to recognize that the strongest impetus for restorative justice processes in Canada derived from concerns about the application of Eurocentric ideas of crime and punishment to First Nations offenders and communities (McNamara 2000: 61), and the extreme over-representation of aboriginal men and women in prisons (Rudin in McCamus, Ontario Legal Aid Review 1997: 441). Significantly, processes of restorative justice are often identified as "aboriginal justice" processes: they involve circles which bring together the offender, the victim, their families and their communities with the objective of "healing" all of the participants.[14] The process is not dominated by professionals but by community elders, and there is no premium on efficiency and finality; as well, "because there is no binary verdict, the offender's past victimization and present disharmony can be recognized as the reason for an offence without denying the needs of the immediate victim or the responsibility of the offender" (Roach 1999: 251). The aboriginal justice approach thus recognizes the need to address both past abuses and future prevention measures.

In concluding this overview of literature on access to justice, crime and punishment, there are two further cautionary comments. One is the need to examine how well reform goals are actually implemented in practice, particularly in a context where there are pressing needs for immediate evidence of change; the possibility of "gaps" between reform goals and their implementation in practice (Nelken 1981) may also be exacerbated by pressures of instrumentalism (Macdonald 1992:

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[14] As McNamara explained, there have been some efforts to differentiate "healing circles" from "sentencing circles" in aboriginal justice processes (McNamara 2000: 81). See also Larry Chartrand "The Appropriateness of the Lawyer as Advocate in Contemporary Aboriginal Justice Initiatives" (1995), 33 *Alberta Law Review* 874.

39). Especially in the context of high volumes of offenders and minor offences, processes of restorative justice may be vulnerable to the same pressures to demonstrate efficiency and effectiveness (in terms of numbers and outcomes) which now apply to criminal courts. As the Law Commission's Discussion paper concluded, the use of restorative justice programmes may reduce court congestion and decrease the numbers of offenders who are incarcerated, thereby reducing costs. Yet, while these features are consequences of restorative justice for its proponents, "for governments these consequences become goals" (Law Commission of Canada 1999: 35). As a result, there is a need to assess the impact of restorative justice programmes, not only in terms of their own objectives but also in relation to their impact on broader goals of access to justice for Canadians.

Second, there is a need to be somewhat wary of the goal of community harmony in the context of restorative justice. As Nader has argued in the American context:

> For those spearheading control policies harmony is an ideology of pacification and a way to civilize populations.... [It] is by means of harmony, a harmony based on the belief that everyone should share the same goals, [that] goals that are central to the contemporary large-scale institutions [are achieved]. Harmony and efficiency ideologies are tools, used to create different cultural forms (Nader 1988: 285).

In the same way, Crawford expressed concern about "alternatives" to traditional criminal proceedings in the United Kingdom, both because of their abandonment or dilution of procedural protections, but also because of the limited extent to which they can *realistically* guarantee voluntariness, agency and voice to the parties, features which are central to their normative appeal and to the goal of achieving harmony and reconciliation among participants. According to Crawford, the increasing "managerialism" of criminal justice, which stresses efficiency, effectiveness, economy and the smooth management of increasing case-loads, means that these fundamental goals of restorative justice models may be undermined or substantially distorted (Crawford in Young and Wall, eds. 1996: 313-314).[15] In this context, issues about models of criminal law as "crime control" reappear, at the same time as traditional protections of "due process" may be more difficult to assert or enforce. Thus, concerns about the underlying values of community harmony must be addressed in any analysis of emerging trends in access to justice; they also signal important issues about public and private conceptions of justice, and about equality in relation to social justice. These issues are addressed in the next sections.

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[15] Ironically, as Crawford explained, the emphasis on efficiency, effectiveness, and economy means that forms of diversion are attractive options for the management of criminal justice: "Given the managerialist appeal of diversion and the administrative ethic from which it draws much of its support, the difficulty - for those committed to

1.3 Public and Private Dimensions of Justice

> I do not believe that settlement as a generic practice is preferable to judgment or should be institutionalized on a wholesale and indiscriminate basis. It should be treated instead as a highly problematic technique for streamlining dockets. Settlement is for me the civil analogue of plea bargaining: Consent is often coerced; the bargain may be struck by someone without authority; the absence of a trial and judgment renders subsequent judicial involvement troublesome; and although dockets are trimmed, justice may not be done. Like plea bargaining, settlement is a capitulation to the conditions of mass society and should be neither encouraged nor praised (Fiss 1984: 1075).

This classic statement by Owen Fiss about settlement and its drawbacks in the civil law context, contrasted with plea bargaining in criminal procedure, reveals many of the concerns about "private" dispute resolution in both contexts: concerns about coercion, a lack of accountability for the decision, and the absence of procedural protections provided in a "public" trial all contribute to his fear that "justice may not be done." Fiss' critique is part of a more general assessment in the literature of informal justice which identifies both benefits and also limits for "bargaining in the shadow of the law" (Mnookin in Eekelaar and Katz, eds. 1984). Although some restorative justice processes may include features that overcome many of Fiss' concerns, there may nonetheless be symbolic aspects of this "privatization of justice" which should be confronted in designing public policies for the justice system.

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extending mediation/diversion because of its reparative appeal - is to ensure that its normative potential is not undermined by the need to dispose of large numbers of cases as quickly and cheaply as possible" (Crawford in Young and Wall, eds. 1996: 343). Such a view suggests that bureaucratic goals may dilute the goal of harmony in restorative justice practices.

1.3.1 The requirement of "community"

The literature comparing informal justice practices in pre-capitalist and modern societies suggests that, to a very great extent, there is a need for "community" to support informal justice practices. For example, Sally Engle Merry conducted comparative studies of the mediation of disputes in four small-scale societies, and drew conclusions for the adaptability of these practices to urban America (Merry in Abel 1982, ed.: 17). Among other conclusions, Merry identified the need for "the existence of a cohesive, stable, morally integrated community whose powers of informal social control can be harnessed to informally achieved settlements" (Merry in Abel, ed. 1982: 34). Yet, as she concluded, because American mediation centres were often located within large metropolitan areas, community pressures necessary to induce disputants to accept a compromise settlement were likely to be absent:

> Disputants [in the USA] are rarely embedded in a close, cohesive social system where they need to maintain cooperative relationships. Even when disputants come from the same neighbourhood, unless they are integrated into a unitary social structure their conflicts in one relationship do not have repercussions for others (Merry in Abel, ed. 1982: 34).

More recently, in the *Journal of Law and Society*, Barbara Hudson also succinctly identified this problem of the need for "communities" in western society: "without the community, restorative justice is reduced to the competing perspectives of the victim and the perpetrator" (Hudson 1998: 251).

Yet, although the need for "community" may create problems for some informal justice practices, it may work well in others. Thus, for example, there has been positive evaluation of practices of circle sentencing within aboriginal communities in Canada (Stuart 1997; Stuart in Galaway and Hudson, eds. 1996), where it is more often possible to find a community which meets Merry's requirements of being "cohesive, stable, and morally integrated," and which may also exercise powers of informal social control. As McNamara suggested, the concept of "community" for purposes of aboriginal circle sentencing may be quite expansive; quoting from Grotsky, J. in *R v. Cheekinew*, he suggested that "the term 'community' ought to receive a wide and liberal construction as the term 'community' may be ... a term capable of different interpretations depending on the residence ... of the particular offender..." (McNamara 2000: 83). As well:

> The *availability* of a community for the purpose of circle sentencing involves more than just being able to define the existence of a group, whether geographically or personally. Community capacity, willingness and preparedness to participate in criminal justice decision-making (and to oversee follow up) is a prerequisite for the success of community-based justice, whether in the form of circle sentencing or otherwise (McNamara 2000: 83-84).

Significantly, some informal justice practices, such as circle sentencing, are closely linked to traditional aboriginal "healing" processes.[16] As a result, minimizing the role of the Crown in circle sentencing in aboriginal communities can represent an acknowledgement of the appropriateness of traditional aboriginal justice - it may even suggest informal recognition of aboriginal self-government (Chartrand 1995); by contrast, minimizing the presence of the Crown in other contexts may subtly suggest that the state has little interest in the concerns of the victim, the offender or the community (Marshall 1998). Thus, as McNamara argued, it is necessary to take account of all the subtle meanings in the use of circle sentencing:

> That the circle carries philosophical, spiritual and cultural significance for many First Nations in Canada is widely recognized. What has been more controversial is whether the circle sentencing is appropriately seen as a product of First Nations' legal cultures based on "traditional" methods of dispute resolution and decision-making in Aboriginal communities, or alternatively, whether circle sentencing is more accurately characterised as the creation of a progressive minority within the Canadian judiciary? (McNamara 2000: 75).[17]

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[16] See McNamara for discussion of some differences between "sentencing circles" and "healing circles" (McNamara 2000: 81). According to Mary Crnkovich, it is important to recognize that there are differences among aboriginal communities. For example, she asserted that community-based initiatives are not rooted in Inuit culture: "adult diversion and circle sentencing are not Inuit traditions" (Crnkovich 1996: 174, quoted in McNamara 2000: 77).

[17] McNamara explored some of the "contradictions" of circle sentencing in relation to aboriginal decision-making (McNamara 2000: 109). As well, he identified problematic assumptions about the appropriateness of family group conferencing, devised according to the tenets of Maori culture in New Zealand, for First Nations communities in Canada (McNamara 2000: 81, quoting *R v. McKay* [1997] 7 WWR 496, a decision of Reilly J.).

Two additional concerns have been identified in relation to ideas about "community" in the context of restorative justice practices. One is the need for community members and community resources to be allocated to informal justice processes. While no one disputes that involvement in the justice system is an important aspect of a community's life, it may be less clear how to determine the relative importance of restorative justice practices, compared to other needs for scarce resources, within communities. These concerns are relevant to aboriginal circle sentencing as well as to programmes for family group counseling and victim-offender mediation - in all of these cases, both community members and other community resources are claimed by the needs of restorative justice, and, as a result, they may not be available for other needs within a community. Moreover, as Abel argued, "informalism can easily deteriorate from a mechanism for 'making rights effective' into a process of diversion whose primary goal is to curtail state expenditures devoted to enforcing ... rights" (Abel 1982, ed: 8). Since restorative justice, and the involvement of communities in its processes, may appear to be less expensive than formal justice precisely because of the use of communities' resources (rather than those of the state), there may be pressures on communities to engage in restorative justice practices primarily for economic reasons.[18]

The other concern about "community" relates to questions of power within communities. To the extent that restorative justice processes rely upon communities to exercise social control, there is a need to unpack the idea of "community" and to examine its internal power relations. As Lacey explained, to the extent that community processes are formalized, they may tend to create their own hierarchies (Lacey 1998; 1988). Moreover, as Marshall argued, these internal power relations may need to be challenged:

> ... The desire to dispute may itself conflict with the community's desire to suppress such altercation, and reconciliation may represent the dominance of the interests of the local 'establishment' over those of disadvantaged litigants. The greater the power differentials within a community, the greater such problems become. For all its faults, the law can be seen to be protecting individual freedom and rights, which might be

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[18] As Crawford put it, "The fear remains that outcome pressures, in an increasingly managerial age, will undermine normative process-oriented goals" (Crawford in Young and Wall, eds. 1996: 343).

> threatened by community-based procedures controlled by local majority interests (Marshall 1985: 53).

This concern may not be of great significance in the context of circle sentencing in aboriginal communities, where the exercise of community power is likely to correspond to traditional authority and thus, is likely to be widely-accepted within the community. As McNamara noted, for example, there is evidence that circle sentencing reflects practices in some aboriginal communities which have existed for 500 years (McNamara 2000: 77).[19] Yet, even in aboriginal communities, there may be unequal power relationships that need to be addressed in restorative justice programmes. As Lorraine Berzins suggested, in some of these communities, there may be:

> ... power imbalances and socio-economic inequities in communities, and communities when left on their own have a history of scapegoating the vulnerable, abusing the rights of the disadvantaged. We could be caught in a tug of war between those who want more power given to communities, and those who don't trust communities with that power - *unless we see clearly that it does not have to be a "one-size-fits-all" solution* (Berzins in Healy and Dumont, eds. 1997: 213, emphasis added).

1.3.2 Individuals and power relationships

A frequently voiced concern about informal justice practices, including restorative justice, is the extent to which they offer insufficient procedural protections (Ashworth 2000: 84). For example, victims and offenders, as well as community participants, may have differential access to economic, psychological or other aspects of individual capacity - and these differences may affect their ability to engage in restorative justice programmes effectively. Particularly in relation to victim-offender mediation, Crawford has similarly suggested that there may be differential power relations between the parties which, if they remain unchecked, may influence settlements (Crawford in Young and Wall, eds. 1996: 340). As well, Joseph suggested that domestic abuse cases might not be appropriate for mediation, in part because of the difficulty of ensuring equal bargaining power between an offender and victim in this gendered context (Joseph 1996). And, while recognizing that formal criminal justice processes may also fail to overcome inequality of power between an offender and a victim - or between an offender and the state - concerns have been expressed that the existence of multiple *and inconsistent* goals in restorative justice programmes may themselves create problems of inequality of power and the potential for abuse:

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[19] See the statement of Morris Little Wolf from the Peigan band in *R v C (LM)*(1995) 41537374Y101101, Jacobson,

> [Many schemes] seek to meet multiple normative and administrative aims, including the promotion of attitude change in offenders, greater involvement of the victim in the process of justice, cutting of cost to the public purse, reduction in court congestion, promotion of restorative justice, and destigmatisation. Perversely, while multiple aims enable diversionary schemes to draw upon a wide and diverse audience for support, they also constitute their Achilles heel. *In seeking to meet the divergent aims that they proclaim, these schemes - particularly mediation and reparation - are pulled in different, and often competing, directions as they attempt to satisfy the divergent demands of their different constituents* (Crawford in Young and Wall, eds. 1996: 343, emphasis added).

Andrew Ashworth also identified some special problems for restorative justice in the relationships which it fosters between victims and offenders (particularly in the context of victim-offender mediation). For Ashworth, the opportunities presented by restorative justice practices to permit offenders to understand, through the participation of the victim, the human consequences of what they have done may create a distortion of the process. As he explained, it is just a short step from such assertions to claims that greater victim involvement is for *the benefit of the offender* and of the wider community, especially as evidenced by reconviction rates:

> The danger is clear: for some people, there has been a slippage between the starting point, which was to support victim-oriented initiatives and restorative justice by reference to the interests of victims, and the idea of judging these initiatives on the basis of what they do for offenders. The danger is that victims are being used in the service of offenders (Ashworth 2000: 88).

J (McNamara 2000: 77).

For Ashworth, the apparent neglect of victims for much of the twentieth century means that there may well be a need to reconsider the involvement of victims in criminal justice processes, including both traditional and restorative justice programmes. At the same time, he cautioned that there is also a need for a principled approach and for sound evidence in the formulation of criminal justice policies.[20] Ashworth's comments link these concerns about victims as individual participants in restorative justice practices to broader, more ideological, concerns about the underlying messages of restorative justice practices.

1.3.3 Privatization of justice: ideology and social change

> Unlike the penal-welfare strategy [rehabilitation], which was linked into a broader politics of social change and a certain vision of social justice - however flawed in conception and execution - the new penal policies have no broader agenda, no strategy for progressive social change and no concern for the overcoming of social divisions. They are, instead, policies for managing the danger and policing the divisions created by a certain kind of social organization, and for shifting the burden of social control on to individuals and organizations that are often poorly equipped to carry out this task (Garland 1996: 466).

David Garland's analysis of strategies of crime control in the United Kingdom at the end of the twentieth century identified how state policies have adapted to the idea that "crime is a normal, commonplace, aspect of modern society, ... an event - or rather a mass of events - which requires no special motivation or disposition, no pathology or abnormality, and which is written into the routines of contemporary social and economic life" (Garland 1996: 450). According to Garland, the state's response includes the "responsibilization strategy": abdication of direct intervention (through police, courts, prisons, social work, etc) and adoption of indirect action through non-state agencies and organizations which are encouraged to take responsibility to prevent opportunities for crime to occur (including, for example, Neighbourhood Watch programmes, retail and apartment security guards, security devices for homes and cars, etc.) "In effect, central government is ... operating upon the established boundaries which separate the private from the public realm, seeking to renegotiate the question of what is properly a state function and what is not" (Garland 1996: 453). As Garland also noted, increasing rates of incarceration reveal the politicization of the state's "law and order" agenda, with the state continuing to remain responsible for *punishment of crime*, whilst diffusing into the community responsibility for *crime control*. In such a context, it is important to examine the goals and methods of restorative justice: might they represent, at least in some cases, examples of "responsabilization"? If so, is this a matter of concern? Or not?

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[20] For another formulation of the relationship between victims and offenders in relation to principles of sentencing, see Martin Wasik "Crime Seriousness and the Offender - Victim Relationship in Sentencing" in Ashworth and Wasik, eds., *Fundamentals of Sentencing Theory* (Oxford: Clarendon Press, 1998). See also Sandra Bacchus "The Role of Victims in the Sentencing Process" in J. Roberts and D. Cole, eds. *Making Sense of Sentencing* (Toronto: University of Toronto Press, 1999); and Barbara Hudson "Restorative Justice: The Challenge of Sexual and Racial Violence" (1998) 23:2 *Journal of Law and Society* 237.

Some of the issues raised by Garland appear similar to concerns traditionally expressed about the problematic nature of state control in the diversion of civil claims from courts to community settings. A number of scholars have argued that the creation of less formal alternatives to courts masks how the state continues to control these new settings; it is not a question of the state withdrawing from dispute management, but rather one of transforming the dispute and rendering the state's role less visible (Harrington 1985: 35). Similarly, Friedman argued that while "lay justice tends to be cheap and informal, ... one of its major vices ... is that it can be used as an instrument of state power, a means of extending central control into every nook and cranny of society" (Friedman in Cappelletti and Weisner 1978: 24). And Cain and Kulcsar have suggested that the use of dispute resolution processes may simply involve "a new form of state-controlled adjudication which is not accountable via the usual democratic representative and parliamentary processes" (Cain and Kulcsar 1981-82: 393). All of these comments appear to suggest, in different contexts, concerns about invisible shifts in public and private responsibilities for dispute resolution; these are similar to the concerns which Zander identified in the Hamlyn lectures about the extent to which the Treasury now defines access to justice in the United Kingdom (Zander 2000: 24). In this way, Garland's analysis of "responsabilization" may be linked to broader concerns relating to access to justice, including concerns about "downloading" of the costs of criminal justice (Crawford in Young and Wall, eds. 1996: 313).

Garland also identified another aspect of privatization in recent developments in criminal law: the ways in which greater recognition of victims' "rights" may contribute to political goals of law and order by individualizing (privatizing) the victims of crime rather than recognizing "the public" as a whole:

> The crime victim is no longer an unfortunate citizen who has been on the receiving end of a criminal harm, and whose concerns are subsumed within "the public interest" that guides prosecution and penal decisions. The victim is now, in a certain sense, a much more representative character, whose experience is taken to be common and collective, rather than individual and atypical.... Whoever speaks on behalf of victims speaks on behalf of us all - or so declares the new political wisdom of high crime societies.... This vision of the victim as "Everyman" (and above all "Everywoman") has undermined the older notion of "the public," and has helped redefine and disaggregate that collective identity. It is not longer sufficient to subsume the individual victim's experience in the notion of the public good: the public good must be individuated - broken down into individual component parts (Garland 2000: 351).

For Garland, this focus on victims reveals new social trends in our ideas about crime and insecurity, and a "reworked relationship between the individual victim, the symbolic victim, and the public institutions that represent their interests and administer their complaints" (Garland 2000: 352). Such a critique raises issues about the extent to which restorative justice practices may represent *privatized* notions of victimization and criminality, and practices which avoid traditional protections for offenders within a *public* system for the administration of justice. Without ignoring the significance of the principles and goals of restorative justice, there is a need to take account of the ways in which they may be adapted, even transformed, by state interests in "downloading" the cost of justice to communities and in using victims to justify increased levels of policing and incarceration.

1.4 Equality and Social Justice

Traditional accounts of access to justice have linked its fundamental goals to norms of equality and efforts to achieve social justice, issues which are more fully explored in chapter 2. However, the relationship between claims about access to justice and more systemic goals of social justice is also relevant to the context of a re-assessment of ideas about *access* and *justice*. To some extent at least, a fundamental tenet for those who focus on issues of *access* to legal proceedings is the idea of the rule of law. Thus, for example, David Dyzenhaus argued that the basic normative justification for legal aid flows from the state's commitment to the rule of law, a commitment which he argued requires more than protections for "negative liberty"(Dyzenhaus in McCamus, Ontario Legal Aid Review 1997: 475). Yet, commitment to the rule of law may not, by itself, achieve *substantive justice*. As Alan Norrie suggested, particularly in the criminal law context, adherence to the rule of law may simply reinforce existing (unequal and perhaps unjust) class relationships:

> When it came to developing the law, criminal law was the last area in which adherence to rational legal principle occurred.... To be sure, where it was a matter of the rights of the middle class and landowners to private property, the lawyers spoke loud and clear, but when it came to the rights of those who confronted private property as a limit upon their actual freedom and social equality, things were different.... [The] rule of (the criminal) law is primarily a mechanism for protecting the property of those who possess it from those who do not, and, more generally, of maintaining a level of social control over those whose position in society makes them victims at the same time as they victimize others.... (Norrie in von Hirsch and Ashworth, eds. 1998: 368).

These views about the rule of law reveal the tensions in traditional criminal law processes between form and substance in relation to equality goals. Similarly, in the context of designing priorities for legal aid services, Douglas Ewart argued that there is a need for lawyers to be aware of the subtle ways in which offenders may experience multiple forms of discrimination in daily life and how these experiences shape their effective participation (and substantive access to justice) in traditional criminal proceedings:

> ... An example is the situation of black men frequently stopped or arrested by the police. When faced with a criminal charge, they may not necessarily need a black lawyer, but they may very well need a lawyer who, through training or related experience, can appreciate what it is like to be denied opportunities because of your race, to be part of a frequently targeted community, to have been frequently stopped and questioned by the police, and to face a courtroom in which yours in the only black face. That appreciation

> is not just helpful to improving client confidence in the service being provided; it is vital for a variety of "traditional" purposes... (Ewart 1997: 15).

Although Ewart is focusing on the form of legal representation here - and the complexity of decisions about access to legal aid services - his comments reveal how substantive justice concerns may often interact with formal entitlements to legal representation. At the same time, Ewart's views do not call into question the fundamental inequality of the criminal justice system in the ways identified by Norrie. Thus, to the extent that restorative justice practices may relinquish *formal* procedural protections, including legal representation, it is important to assess whether and how they meet goals of *substantive* social justice. Even assuming that such goals are met, however, Norrie's question about whether these procedures address - or perhaps exacerbate - issues of fundamental inequality may remain.[21]

Proponents of restorative justice practices also claim that these processes empower participants in ways that traditional criminal courts cannot. In this sense, empowerment *per se* represents a goal of equality and social justice. A decade ago, David Trubek identified the "empowered self" as an inherent feature of alternative dispute resolution for civil claims in the American context; moreover, he suggested that the rise of ADR processes offered a new and important critique of earlier ideas of access to justice, ideas which were embedded within legal liberalism. According to Trubek, the earlier access to justice movement foundered precisely because there is a "limit to how far one can go in achieving justice through enhancing what legal reformers call 'access'" (Trubek in

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[21] The National Council of Welfare, for example, recommended that:

> Governments should recognize the strong links which exist between poverty, child abuse and neglect, unemployment, inequality and crime, and should give their unqualified support to measures which will correct these problems, such as programs to reduce child poverty and abuse and to provide meaningful activity, challenge and hope to adolescents and young adults.

See National Council of Welfare, *Legal Aid and the Poor* (Ottawa: Min. of Supply and Services, 1995) 78-79.

Hutchinson, ed. 1990: 108). In looking to alternative dispute resolution practices instead, Trubek argued that it presented a fundamental questioning of "liberalism's individualistic, rights-based notion of self-empowerment;" rather, the proponents of alternative forums envisaged "possibilities for greater community, new sources of law, and a different understanding of self-empowerment":

> For these radical voices, what was wrong with traditional civil procedure was not just its monetary costs, but the fact that it presumed that the enforcement of legally defined rights was both necessary and sufficient to ensure self-empowerment. These radical ADR proponents sought procedures that would both employ and develop community norms and values, allow the development of normative agreement through open dialogue, and be sensitive to the importance of social relationships in the maintenance and enhancement of self (Trubek in Hutchinson, ed. 1990: 122).

Whilst recognizing the aspirations of the ADR movement, however, Trubek concluded that, at least in some cases, traditional legal institutions had already captured and co-opted the new movement, *employing its rhetoric to relieve court congestion but without making civil justice more accessible* "either in monetary or existential terms. And certainly they have no radical or transformative content" (Trubek in Hutchinson, ed. 1990: 127, emphasis added). All the same, he suggested that ADR represented not just another quest to achieve justice within liberalism, but a tentative effort to expand our ideas of self and empowerment beyond its intellectual confines.

Yet, the difficult challenge of translating these challenging goals into concrete action was revealed in empirical research reported by Joel Handler in relation to client-patient empowerment: in the context of privatized health care, in community care for the elderly, and in worker safety programmes. These concrete circumstances demonstrated the complexity of relations of "power" and "empowerment", and the need to understand empowerment as more than just participation:

> Participation is usually justified in process terms - autonomy, dignity, and respect. These are values in and of themselves. But I think that something more is necessary; there have to be substantive benefits from co-operation - reciprocal, concrete or material incentives. Because the power relationship is so unequal when dependent people are dealing with large-scale public agencies, unless there are strong, reciprocal, concrete incentives, including financial incentives, I don't believe that the humanistic values of mutual respect, altruism, and professional pride would be enough to sustain equal moral agency.... (Handler 1993: 262; and see also Handler 1988).

In the criminal law context, these comments raise important questions for restorative justice practices, and the extent to which they must be particularly attentive to issues of substantive equality and social justice in relation to claims about empowerment.[22] In a recent assessment of restorative justice and social justice, for example, John Braithwaite confronted the apparent dichotomy between them. Recognizing that both offenders and victims in the criminal justice process are often poor and powerless, Braithwaite argued that "if both victims and offenders get some restoration out of a restorative justice process, that has progressive rather than regressive implications for social justice" (Braithwaite 2000:194).[23] Such arguments clearly invoke the need to examine carefully how equality and social justice are defined, and demonstrate the need for empirical research about the effectiveness in practice of claims about restorative justice practices. For example, Richard Delgado has suggested that victim-offender mediation may "upset social expectations by casting a wider net of state control than we expect" (Delgado 2000: 761). Referring to minor cases which would ordinarily have been dismissed in the traditional criminal justice system, but which may now receive "full-blown treatment" under restorative justice practices, Delgado suggested that failure to make restitution as required might result in *higher* rates of incarceration for offenders (Delgado 2000: 761-762).

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[22] Lorraine Berzins has suggested: First of all, the main question for restorative justice is not whether to put someone in prison or not. The main question is what justice process and what sentence can best deliver safety and healing for real people who must ultimately continue to live with each other, by and large, in our various communities across the country: *positive* goals for which we need to provide *positive* tools, an assortment of social, economic and health services for victims, for offenders, for the ripple effect in their communities ... not "one size fits all" (Berzins in Healy and Dumont, eds. 1997: 213).

[23] Braithwaite also confronted feminist critiques about the use of restorative justice practices for domestic violence cases, reporting on the positive outcomes revealed in Joan Pennell's research on family group counselling cases for domestic violence in Newfoundland (Pennell and Burford in Hudson *et al*, eds.1998: 206):

> Restorative justice advocates [argue] that court processing of family violence cases actually tend to foster a culture of denial, while restorative justice fosters a culture of apology. Apology, when communicated with ritual seriousness, is actually the most powerful cultural device for taking a problem seriously, while denial is a cultural device for dismissing it... (Braithwaite 2000: 189).

For some critiques of "shaming," see Toni Massaro, "Sham Culture and American Criminal Law" (1991), 89 *Michigan Law Review* 1880; and Robert Weisberg, "Criminal Law, Criminology and the Small World of Legal Scholarship" (1992), 63 *University of Colorado Law Review* 521.

As well, Delgado identified the problem for restorative justice practices: the absence of potential for social transformation:

> No advocate of VOM, to my knowledge, suggests that the middle-class mediator, the victim, or society at large should feel shame or remorse over the conditions that led to the offender's predicament. Of course, many offenders will be antisocial individuals who deserve little solicitude, while many victims will have well-developed social consciences and empathize with the plight of the urban poor. But nothing in restorative justice or VOM encourages this kind of analysis or understanding. In most cases, a vengeful victim and a middle-class mediator will gang up on a young, minority offender, exact the expected apology, and negotiate an agreement to pay back what she has taken from the victim by deducting portions of her earnings from her minimum-wage job. Little social transformation is likely to arise from transactions of this sort ... Mediation treats the *victim* respectfully, according him the status of an end-in-himself, while the offender is treated as a thing to be managed, shamed, and conditioned. Most surveys of VOM programs ask the victim if he felt better afterwards. By contrast, offenders are merely asked whether they completed their work order and whether they recidivated. Offenders sense this and play along with what is desired, while the victim and middle-class mediator participate in a paroxysm of righteousness. In such a setting, the offender is apt to grow even more cynical than before and learn what to say the next time to please the mediator, pacify the victim, and receive the lightest restitution agreement possible.
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> The offender's cynicism may not just be an intuition; it may be grounded in reality: Informal dispute resolution is even more likely to place him at a disadvantage than formal adjudication. (Delgado 2000: 764-766).

In this context, goals of substantive equality and social justice pose hard questions for restorative justice as well as for traditional processes of criminal justice in Canada. To what extent can we measure outcomes in terms of substantive justice? Or, in Zander's words, must we simply accept that "the concept of justice in legal cases ... is too deep for any research project"? These questions provide the context and conceptual framework for our discussion of "needs" and "responses" in the chapters that follow. We return to these questions in our critique in chapter 4.

2 RE-ASSESSING "NEEDS" IN RELATION TO *ACCESS* AND *JUSTICE*

2.1 Introduction

> For anyone trying to explain the historical waves of the "access to justice" movement by demand factors, the present day policy debate must be a puzzle. In times of rising unemployment, marginalization of the welfare population and increasing refugee migration, the "legal needs" of the poor are clearly growing. Nevertheless, in the very time of growing needs, welfare spending is coming under pressure including the budgets for legal aid subsidies. Government spending remains cyclical with the economic recession where it ought to be anticyclical in order to compensate for growing poverty (Blankenburg 1993: 201).

Blankenburg's assessment of the puzzling (lack of) governmental response to "needs" for access to justice in times of economic recession provides a good starting point for a re-assessment of approaches to *justice*, beyond *access to the legal system*. As he noted, circumstances such as unemployment, welfare, and refugee status often result in poverty, and the condition of being poor may well create legal needs. Yet, while poverty often creates legal needs, it is important to recognize how the needs of poor clients are seldom congruent with *just* "legal needs" (Wexler 1970; Gavigan in Comack *et al*, eds. 1999).[24] Interestingly, Blankenburg's concern is with *legal aid* as a response to "legal needs;" yet, if legal aid is merely the "first wave" of access to justice initiatives, as Cappelletti and Garth suggested, it is unlikely to provide a response which is truly effective (Cappelletti and Garth 1978). Indeed, as Richard Young and David Wall suggested, "the present legal aid scheme may not in practice contribute much to social justice, and may even play a part in perpetuating social injustice" (Young and Wall, eds. 1996: 25). Moreover, the poverty context is complicated; as some studies suggest, current legal aid policies must take more account of differences within poor communities: "research and public policies that treat the poverty community as a nondifferentiated homogeneous population are subject to problematic results" (Meeker, *et al.* 1986: 159).

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[24] As Gavigan argued, the relationship between legal services and client needs must take account of the extent to which poverty impacts on all aspects of the lives of poor clients:

> To a great many lawyers and legal aid administrators, legal services for the poor mean criminal defence work, criminal legal aid.... Nevertheless, in its report *Legal Aid and the Poor*, the National Council of Welfare (1995: 9-12) argues that legal aid programs emphasizing criminal legal aid do not address the legal needs of most poor people, including not incidentally, poor women.... The image of the poor in these "legal aid" programs becomes blurred and imprecise, and the experience of poverty becomes abstracted into discrete legal problems or issues. But the lives of poor people do not lend themselves to simple one-on-one legal solutions. Poverty law lawyers must have and hold onto an appreciation of the complex and central nature of poverty in the lives of their clients and the need to acknowledge that the most significant struggles, defeats, and victories in their clients' lives are seldom, if ever, experienced in the courtroom. When a poverty law lawyer wins a welfare case or a landlord and tenant case, the best legal result is that the client is still on welfare or is still a tenant. Those victories are important, but they are hardly "transformative" of the deeper problems of the poor litigant. The lawyer may win, but the client remains poor (Gavigan in Comack *et al*, eds. 1999: 220-1).

In the context of this review of access to justice in the administration of criminal law, however, Blankenburg's assessment is significant for what it reveals about the concept of legal "needs": needs which are much more often conceptualized in the context of civil law, not criminal law. Indeed, it is startling how many policy studies of "legal needs" seem to focus primarily, or even exclusively, on ideas about needs for legal services in relation to matters that fall within the scope of civil law activity (Johnsen in Regan *et al.*, eds. 1999: 205).[25] As well, while many studies have used legal categories of claims to assess legal needs, rather than more broadly-based social indicators of "need" (Mossman 1993: 17; Hanks 1987), there is an absence of any discussion in the majority of these studies about "needs" within the criminal law context. Thus, Johnsen reported, "civil legal aid appears vulnerable to shifts in both the economy and political ideology;... only within criminal legal aid has a broad consensus on minimum standards developed" (Johnsen in Regan *et al.*, eds. 1999: 231). Similarly, Bogart *et al* explained in the context of Ontario's review of legal aid:

> Almost all of the studies and the discussion of legal needs in general and their relevance for legal aid are focused on civil disputes (including, of course, family issues). Criminal issues almost always receive separate treatment on a basis that affords those charged

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[25] Johnsen identfied the legal needs research as vast:

> Among the early, well-known studies were Abel-Smith, Zander and Brooke (1973) from the UK; Eskeland and Finne (1973) from Norway; Messier (1975) from Canada; Cass and Sackville (1975) from Australia; Schuyt, Gronendijk and Sloot (1976) from the Netherlands; and Curran (1977) from the USA. Among recent studies are the Comprehensive Legal Needs Study (CLNS) conducted by the American Bar Association ... and Blacksell, Economides and Watkins (1991) from the UK - although the latter try to avoid the term 'legal needs' in their analysis.... (Johnsen in Regan *et al*, eds. 1999: 209).

> with serious criminal offences highest priority in legal aid schemes. The rationale that has long been accepted is that being convicted of serious criminal charges can result in the loss of freedom, the severest sanction (Bogart *et al.* in McCamus, Ontario Legal Aid Review 1997: 319).

Yet, within this consensus about minimum standards for legal aid in criminal law matters, the fundamental question is whether the provisions of legal aid actually address "needs" in this context - or whether they simply replicate the legal categories of the criminal justice process. As Bogart's comment suggests, policy-makers have tended to assume that "needs" in the criminal justice context are commensurate with categories of offences and the processes of criminal law and sentencing. Although the traditional priority accorded to legal aid services for indigent accused persons is not our primary concern here, there is a need to examine more carefully the criminal justice context and the "needs" of those who become involved in it: what are the "needs" of offenders, victims, their families and communities, and society at large? Such a question moves beyond the requirements of legal representation (Johnson Jr. 2000: S83), and even legal aid delivery (Ewart 1997; Zander 2000), to more fundamental issues about the criminal justice system. To be sure, there are a few examples of "legal needs" surveys which do take account of those involved in the criminal justice system; in New Zealand, for example, needs assessments have been undertaken in Maori communities to assist in policy-making for disadvantaged communities in relation to crime and other kinds of legal needs (Opie and Smith in Reilly *et al.*, eds. 1999: 143). Yet, by focusing close attention on the question of "needs" for those in the criminal justice system, different kinds of questions emerge. For example, Barbara Hudson has argued that a focus on "needs" in relation to the sentencing of offenders raises policy questions about the relevance of "difference," especially for those who are women and racial minorities:

> What is beyond doubt is that responding to difference is the most challenging of tasks for criminal justice: the ideal of finding a response to difference which neither represses it, as in the future-oriented strategies of old-style rehabilitation and new-style incapacitation, nor denies it, as in oversimplified and unsophisticated proportionality schemes. Whilst proportionality of penalty to harm is an important element of penal justice, and whilst fairness and equality of treatment are vitally important values of law, "justice" involves more than questions of distribution; it involves moving beyond the "distributive paradigm," towards acknowledging the demands of alterity, that is to say,

> of developing sensitivity to the needs of the "Other," someone who is unlike in biography and perspective. "Justice" is about recognizing the Other in her/his individuality and ensuring that what is delivered by law is appropriate to that individual (Hudson in Ashworth and Wasik, eds. 1998: 249).

Such conceptions of criminal justice challenge fundamental issues within the traditional paradigm of liberal legalism. Moreover, as Trubek argued, the rigidity of rights-claims in the traditional adversarial system has attracted considerable criticism; as a result, proponents of restorative justice seek to redefine the purpose of law as fulfillment of *needs* rather than protection of *rights*:

> A needs-based approach to justice has appeal to many. It seems better able than legal justice to deal with the complexities of particular conflicts and to be more responsive to individual concerns. In this sense, it seems to promise truer or more fundamental self-empowerment than liberal legalism (Trubek in Hutchinson 1990: 125).

Accordingly, as Trubek suggested, a needs-based approach to justice signaled "not another wave of the quest to achieve justice within liberalism, but an effort, however tentative, to expand our ideas of self and empowerment" (Trubek in Hutchinson 1990: 128). In this way, a focus on individual needs and empowerment has the potential to achieve individualized justice, by contrast with the emphasis on abstract rights within liberal legalism. Trubek recognized the vulnerability of these needs-based justice practices; for example, it is clear that power may be exercised (and even abused) other than in hierarchical contexts, so that it is necessary to ensure that participants in restorative justice programmes experience real empowerment, not merely "the legitimation of their own subjugation or control" (Silbey and Sarat 1989: 457). Interestingly, recent poverty law scholarship has similarly focused on the need to examine lawyer-client relationships carefully, so as to recognize how the construction of lawyers' roles may limit client autonomy; or, on the other hand, how poor clients may sometimes assert "self" and "empowerment" in spite of their lawyers' efforts to maintain control over the proceedings (Simon 1995: 6; White 1990).

In the criminal justice context, some of the implications of these differing approaches based on "rights" and "needs" were assessed in an exchange between Daniel Van Ness and Andrew Ashworth in 1993 (Van Ness 1993; Ashworth 1993; Van Ness 1993). For Van Ness, restorative justice "seeks to respond to crime at both the macro and the micro level - addressing the need for building safe communities as well as the need for resolving specific crimes" (Van Ness 1993: 259). Comparing restorative justice programmes to traditional criminal justice, Van Ness suggested that restorative justice:

1. views crime as more than an offence against the state - crime also causes injuries to victims, the community, and the offender;
2. recognizes that the primary goal of a criminal justice process is to repair these injuries; and
3. promises a collaborative effort between the state on one hand and victims, offenders and their communities on the other.[26]

As Van Ness explained, "the focus of restorative justice, then, is intentionally holistic" (Van Ness 1993: 259-260).[27] In responding to Van Ness, Ashworth's critique identified the problem of adopting a "harm" basis within criminal law itself. For Ashworth, the claim that victims have *rights to services*, such as restitution and better communication within criminal justice processes, does not necessarily mean that they should also have *procedural rights* in the criminal courts. Particularly in relation to the goal of fairness in sentences among different persons accused of the same crime, the use of a "harm suffered by the victim" approach may lead to disparate sentences for the same offence. As well, Ashworth pointed to the vagueness of the concept of "community harm" in some restorative justice proposals:

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[26] The distinctions identified by Van Ness between traditional justice and restorative justice have also been explained in other studies of restorative justice: for example, see Nova Scotia Department of Justice, *Restorative Justice* (Halifax: NS Dept of Justice, 1998) 2; and Mark Umbreit, *Victim Meets Offender: The Impact of Restorative Justice and Mediation* (New York: Criminal Justice Press, 1994) at 3-4. According to Umbreit, victim-offender mediation is "the clearest expression of restorative justice," and "represents one of the most creative efforts to: hold offenders personally accountable for their behavior; emphasize the human impact of crime; provide opportunities for offenders to take responsibility for their actions by facing their victim and making amends; promote active victim and community involvement in the justice process; and enhance the quality of justice experienced by both victims and offenders" (Umbreit 1994: 5).

[27] Van Ness examined four challenges for restorative justice. He identified these challenges as 1) the challenge to abolish criminal law (concluding that criminal law should be maintained for secondary victims, and because it channels retributive emotions in society and enforces public values); 2) the challenge to rank multiple goals-deterrence, incapacitation, rehabilitation, and retribution (concluding that restorative outcomes should be prioritized over procedural goals); 3) the challenge to determine harm rationally (the need to take account of the potential inconsistency as a result of differences in victims' experiences of harm); and 4) the challenge to structure community-government cooperation (Van Ness 1993).

> To put the point bluntly, in what sense can restorative justice be applied to the community? How can the harm to the community be assessed? What forms of restorative justice should be used? How should their quantum be assessed? And how does this process differ from that under a punishment paradigm?.... I find no contradiction in being strongly in favour of better services and fuller compensation (restitution) for crime victims, whilst rejecting greater victim participation in the process of criminal justice and remaining skeptical of many other aspects of restorative justice (Ashworth 1993: 294 and 299).[28]

While it is clear that restorative justice proponents view the need for healing - on the part of the offender, the victim and the community - as primary, more traditional theorists of criminal justice continue to give priority to ideas of "rights" in criminal procedure and "just deserts" in sentencing. In this context, there are obviously differing understandings of the "needs" of participants in the criminal justice system, although these "needs" appear to be more often determined by reference to abstract principles than by empirical studies. Similarly, "needs" for legal aid services for accused persons have been defined in terms of offences in the criminal justice system rather than in relation to accused persons - that is, "need" means the need for legal representation at different points of criminal law processes. In such a context, there are undoubtedly many accused persons, victims, family members and even lawyers who feel a loss of power within the criminal justice system, so that opportunities for empowerment in restorative justice processes must appear attractive. At the same time, if we are serious about pursuing *justice*, and not merely better *access* to it, it may be important to test some of these assertions with empirical research about "needs." In providing an overview of some of the literature about "needs" in criminal justice, this chapter examines ideas about needs in relation to areas of criminal justice where restorative justice practices have been advocated: the "needs" of aboriginal accused and their communities; the needs of offenders, including young offenders and those from racial minorities; and the "needs" of victims and communities.

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[28] In his brief response to Ashworth, Van Ness suggested that "the major difference between us on this topic is over whether there is actually a need for 'new wine,'" explaining that Ashworth's commitment to the punishment paradigm is too narrow and fails to recognize the political context of sentencing policy. Van Ness also asserted that Ashworth had failed to recognize the interests of the community, an entity quite different from the state. In their interchange, Van Ness and Ashworth thus identified a number of key aspects of current debates about "needs" on the part of those involved in criminal justice processes, by contrast with the "rights-based" system of traditional criminal justice (Van Ness 1993).

2.2 Aboriginal "Needs" for Justice: A Need for Aboriginal Justice?

> If one follows respect, the conclusion is that no (justice) system is more valid than the other. But the Euro-Canadian validity is forced upon our ways. The Euro-Canadians are breaking our laws day in and day out, as they accuse us of breaking theirs (Ross 1995: 432, quoting an Ojibway Elder).

No one associated with the criminal justice system in Canada can ignore its impact on aboriginal people. As Carol La Prairie reported, the rate of incarceration of aboriginal people in some Canadian provinces (especially Saskatchewan, Alberta and Manitoba) is significantly higher than their proportion of the population (La Prairie in Roberts and Cole, eds. 1999: 179). Even in provinces such as Ontario, where the rate of incarceration for aboriginal people is somewhat less dramatic, there are good reasons to believe that the figures collected by government may underestimate the numbers of aboriginal people involved with the justice system. As Jonathan Rudin has argued, individuals usually have to self-identify and produce their status card or status registration number in order to be included in the statistics; thus, it is likely that non-status Indians and Métis may often be excluded from the statistics, even though their circumstances are similar to aboriginal people who are included (Rudin in McCamus, Ontario Legal Aid Review 1997: 447). Beyond the statistics, moreover, it is clear that there is a need to identify *why* there are disproportionate numbers of aboriginal people in the criminal justice system - in order to design appropriate responses.

In his review of legal needs of urban aboriginal people and those on southern reserves in Ontario, Rudin identified three theories that have been used to explain the over-representation of aboriginal people in the justice system. According to Rudin, the "culture-clash" theory is based on the lack of familiarity of aboriginal people with the system of justice in Canada; thus, there is a need to assist them to participate in it more effectively. To this end, initiatives such as the aboriginal courtworker programme, native Justices of the Peace, cross-cultural training programmes and specialized legal aid services were designed to "assist Aboriginal persons involved with the law to better understand their rights and the processes they are involved with" (Rudin in McCamus, Ontario Legal Aid Review 1997: 458). Similarly, as Donald Auger argued, the justice system must take account of the fact that English (or French) may not be the first language of most aboriginal accused. Moreover, even with appropriate court interpreters and glossaries of aboriginal words, the translation of aboriginal languages to English or French may be difficult because of differing meanings within cultural contexts:

> For example, in the native language there is no way to translate the word "guilty." In the Ojibwa and Cree language there is a way to say "I did it," but that has a totally different meaning than saying "I am guilty," which would roughly be translated as "I did it and I meant to do it." Thus the role of the court interpreter is not just interpretation, but also translation. That is, in addition to getting the client to understand what the word means in his or her own language, the interpreter must also provide some translation of what the word means because some of the words involve whole ideas or sets of ideas and come from a different philosophical background.... [This creates problems because] there are not many people ... who can ... translate the meanings of these words for a person who requires that some translation be provided (Auger in McCamus, Ontario Legal Aid Review 1997: 422).

As a result of these problems and others, Auger identified aboriginal people as "*the poorest of the poor*" in Ontario, and suggested that their disproportionate representation in the criminal justice system indicated "a pressing need for legal services" for them (Auger in McCamus, Ontario Legal Aid Review 1997: 433).[29]

Yet, as the Royal Commission on Aboriginal Peoples concluded, these programmes do not attempt to change the way that the criminal justice system deals with aboriginal people; they merely attempt to lessen the feelings of alienation experienced during the interaction (Rudin in McCamus, Ontario Legal Aid Review 1997: 458, quoting *Bridging the Cultural Divide* 1996: 93). Moreover, as Justice Murray Sinclair suggested, it may be time to question how the Canadian justice system deals with aboriginal people: "Perhaps the question should be restated as 'what is wrong with our justice system that Aboriginal people find it so alienating?'" (Rudin in McCamus, Ontario Legal Aid Review 1997: 459, quoting Sinclair 1994). In addition to such critiques, Rudin concluded that the culture-clash theory was not entirely satisfactory since it did not explain the over-representation in the justice system of aboriginal people who had lived for many years in urban areas of Canada. Thus, he concluded that while the theory had some merit, it was not sufficient on its own to explain the high rate of representation of aboriginal people in the criminal justice system.

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[29] Kent Roach also identified the "double disadvantage" of Aboriginal people: being significantly overrepresented among both those imprisoned and those victimized by crime. As he argued "respect for the due-process rights of Aboriginal people is necessary, but it alone will not likely reduce Aboriginal overrepresentation in prison.... Packer's two models of criminal justice do not offer much hope for Aboriginal people" (Roach 1999: 250). See also Heino Lilles "Innovations in Aboriginal Justice - Community Justice Update: Yukon" in Healy and Dumont, eds. 1997.

Rudin considered a second explanation: the socio-economic theory. According to this theory, the over-representation of aboriginal people in the criminal justice system is directly related to their poverty - that is, the likelihood of incarceration is greatly increased for those who are poor, and since aboriginal people are often *the poorest of the poor* in Canada (Auger in McCamus, Ontario Legal Aid Review 1997: 433), they are more likely than others to be represented in the criminal justice system. Although Carol La Prairie has suggested that factors such as the relatively higher aboriginal birth rates and the disproportionate number of aboriginal people currently in the age group most vulnerable to criminal law intervention also need to be considered, she identified the socio-economic situation of aboriginal people as a major factor; quoting Michael Tonry, she argued that:

> ... group differences in offending patterns are the consequence of historical experiences and contemporary social and economic circumstance ... Poverty, disadvantaged childhoods, welfare, educational deficiencies, and lack of marketable skills are powerfully associated with a number of social pathologies, including criminality (La Prairie in Roberts and Cole, eds. 1999: 182, quoting Tonry 1994).

Significantly, if poverty is regarded as the explanation for over-representation on the part of aboriginal people in the justice system, measures such as culturally-specific justice programming will not respond effectively to these "needs." La Prairie's concern is that because such indigenization programmes "do little to address socio-economic marginalization they will not substantively address problems of over-representation" (Rudin in McCamus, Ontario Legal Aid Review 1997: 460, quoting La Prairie 1988). Instead, initiatives designed to develop economic self-sufficiency among aboriginal communities, coupled with provision of legal aid services for aboriginal accused, will be much more effective in changing the proportion of aboriginal people in the criminal justice system. While Rudin indicated some agreement with this socio-economic theory to explain the problems of aboriginal representation in criminal justice processes, he concluded that it was ultimately inadequate because it could not explain why aboriginal people are so poor - indeed, in the words of the Royal Commission on Aboriginal Peoples, why aboriginal people are "poor beyond poverty."

For Rudin, a third theory was most persuasive: the theory that colonial policies of assimilation in Canada destroyed the lives of thousands upon thousands of aboriginal people. Pointing to the *Report of the Aboriginal Justice Inquiry of Manitoba*, Rudin argued that "... the relatively higher rates of crime among Aboriginal people are a result of the despair, dependency, anger, frustration and sense of injustice prevalent in Aboriginal communities, stemming from the cultural and community breakdown that has occurred over the past century" (Rudin in McCamus, Ontario Legal Aid Review 1997: 462, quoting *Report of the Aboriginal Justice Inquiry of Manitoba* 1991: I, 91). Rudin agreed with the recommendations of the Royal Commission on Aboriginal Peoples that the colonial legacy must be taken into account in designing interventions which can substantially affect the relationship between aboriginal peoples and the criminal justice system:

> While not ignoring the impact of the culture-clash between Aboriginal and non-Aboriginal society nor the socio-economic realities confronting Aboriginal people, this report agrees with the conclusions of others before it, that the experience of colonialism best explains Aboriginal over-representation.... Without taking away the need for programs that provide Aboriginal people with assistance in dealing with the court system, both through courtworkers and counsel, it is hard to see how reliance on a legal system that is rooted in the colonial system that has led to the problems faced by Aboriginal people can lead to real change (Rudin in McCamus, Ontario Legal Aid Review 1997: 463).[30]

Thus, in assessing the "needs" of aboriginal accused in the criminal justice system, and the appropriateness of different kinds of interventions, these theories or explanations for the current over-representation are critical. If socio-economic factors affect the rate of aboriginal involvement in the criminal justice system, then many of the "needs" of aboriginal accused require a focus on the reasons for their impoverishment. If colonial heritage is the explanation for over-representation of aboriginal accused in the criminal justice system (perhaps in addition to other explanations), different "needs" must be met: very likely, "needs" for an indigenous justice system. In this context, La Prairie has drawn attention to the need for much better data in Canada, similar to that now collected in other western countries, in order to be able to assess whether policies respond to the issues precisely (La Prairie in Roberts and Cole, eds. 1999: 184).

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[30] According to Judge Murray Sinclair, "the primary meaning of 'justice' in an Aboriginal society would be that of restoring peace and equilibrium to the community through reconciling the accused with his or her own conscience and with the individual or family that is wronged" (Sinclair, in Gosse *et al*, eds. 1994: 178).

However, as the literature about Aboriginal people and criminal justice reveals, a more fundamental "need" has been frequently identified in relation to aboriginal communities: a need for recognition of their own justice system. As Auger suggested, such a need does not mean that aboriginal communities would need to establish their own system: "they merely need to have the existing system that is already there to be recognized by mainstream society." Such recognition of aboriginal justice systems would go beyond "diversion programs where Indian people are allowed to participate in sentencing panels but not in the determination of guilt and certainly not in determining what the system should look like and what the laws should be within the community" (Auger in McCamus, Ontario Legal Aid Review 1997: 420). Similarly, Roach suggested that recognition of Aboriginal justice could reduce "both incarceration and victimization" of Aboriginal people:

> The holistic approach of Aboriginal justice both promises prevention in the future and recognizes the need to address past abuses suffered by offenders and victims. Aboriginal people have been frequently and grievously harmed by the failures of due process and crime control, but their own traditions and circle healing initiatives offer the most developed and inspiring alternative to the linear processes of the due-process obstacle course and the crime-control assembly line (Roach 199: 251).

Others have also criticized traditional processes of criminal justice for Aboriginal people. As Daniel Kwochka explained, the process of sentencing in Canada's criminal justice system does not accord with fundamental values of aboriginal communities and aboriginal justice. As he says, Aboriginals view the sentencing process as:

> (1) based on a foreign goal of punishment, instead of upon the aboriginal goals of restoration and rehabilitation;
>
> (2) conducted in an improperly adversarial fashion, with sides being taken, hard-line positions being entrenched, helpful witnesses being challenged as liars, and the accused being treated as an adversary of his own community;

> (3) based on the belief that a sentence which is imposed by uninvolved, third-party strangers to the group can be effective, contrary to an aboriginal belief that solutions must be proposed by all of the affected parties if they are to have any chance of being carried out by them; and
>
> (4) focused too narrowly on events, when the real issues centre on the quality of relationships which surround all the effective parties (Kwochka 1996: 160-161).

Kwochka's analysis is similar to those of the Ojibway Elder quoted at the outset: there is a need for aboriginal justice processes to replace the criminal justice system. In the past decade or so, there have been a number of initiatives in Canadian courts to support the need for specialized sentencing processes, respectful of aboriginal culture (Stuart in Galaway and Hudson, eds. 1996: 193); as well, it has been suggested that the decision of the Supreme Court of Canada in *R. v. Gladue* in 1999 (which confirmed the interpretation of section 718.2(e) of the *Criminal Code*)[31] "has brought the notion of healing into the mainstream as a principle that a judge *must* weigh in every case involving an Aboriginal person in order to build a bridge between their unique personal and community experiences and criminal justice" (Turpel-Lafond 1999: 35). In such a context, the "needs" of the offender in relation to sentencing have been defined explicitly in accordance with aboriginal culture.

Beyond a focus on sentencing *per se*, Rupert Ross has recommended a comprehensive process of aboriginal justice: that is, using aboriginal justice processes to fully replace the system of criminal justice for aboriginal people. According to Ross, aboriginal justice has seven important aspects, all of which differ significantly from those of the criminal justice system:

1. the involvement of all the people who operate in relationships, not just individual offenders;

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[31] (1999), 23 CR (5th) 197, 133 CCC (3d) 385, [1999] 1 SCR 688. According to Turpel-Lafond, the decision in *R. v. Gladue* creates an obligation for the judge, but this responsibility can be discharged only "if counsel and the supporting agencies in the criminal justice system, such as probation and youth services, assist the court by providing a full picture of the circumstances of the defendant and the offence" (Turpel-Lafond 1999: 37).

2. a recognition that people need help to deal with their incapacities and to learn skills to avoid future problems, rather than an emphasis on "choice";
3. a focus on disharmonies in relationships which lead to inappropriate actions, not just a focus on the actions themselves;
4. a structure which reduces, rather than escalates, tensions (unlike the adversary system which may increase hostilities);
5. a commitment to convincing people that they are more than their antisocial actions and to overcoming alienation, rather than labeling and stigmatizing them;
6. a need to bring the offender to a felt awareness of the impact of his or her actions on others, to understand the consequences of the actions, rather than simply providing restitution; and
7. a reliance on people who are connected, rather than on professional experts (Ross 1995: 432-434).

As is evident, these recommendations are not simply designed to reduce alienation for aboriginal people in the Canadian justice system. Instead, they recognize a "need" on the part of aboriginal people to be judged within their own culture and system of justice. Such a model clearly responds to a felt need on the part of aboriginal people to return to their own justice systems, abandoning the idea that traditional criminal justice processes are appropriate for meeting their needs. In such a context, there would no longer be "culture clash" since aboriginal people would no longer be involved in the traditional criminal justice system; at the same time, it is unclear what would be the continuing impact of socio-economic problems for aboriginal justice processes. In this way, different understandings of the reasons for over-representation of aboriginal people in the current justice system impact on choices about appropriate strategies for confronting this problem. Reflecting the view that aboriginal justice is the appropriate strategy overall, Griffiths and Hamilton concluded that:

> Criminal behaviour is often only a symptom of deeper community and individual ills.... Aboriginal-controlled justice programs and services, premised on Aboriginal culture and traditional practices, hold great promise and can provide models that may be utilized by

> non-Aboriginal communities as the search for more effective criminal justice strategies intensifies (Griffiths and Hamilton in Galaway and Hudson, eds. 1996: 189-190).

In assessing one example of aboriginal justice, moreover, Phil Lancaster suggested a need for resources to be provided to aboriginal communities for justice initiatives, and that aboriginal communities should have discretion in the use of funds and in the distribution of specific justice roles: "Rather than providing funds for police, probation workers, child and family service workers, courts, judges and others, funding might be more effectively spent by developing a holistic approach based on custom to work *in* the community and *with* the outside justice institutions" (Lancaster 1994: 349).

In addition to this literature supporting a general recognition of aboriginal justice, however, there are some studies that focus on "needs" in terms of particular kinds of criminal activity. In particular, there are recent studies about the needs of aboriginal women in the context of wife abuse and sexual assault. While extolling the virtues of restorative justice in a number of programmes across Canada, Curt Taylor Griffiths also noted some critical issues surrounding the involvement of victims in community justice initiatives (Griffiths 1999: 292 ff). Significantly, he reported on a 1998 study showing the exclusion or minimization of crime victims in a Winnipeg project; at the same time, he identified an evaluation of the Hollow Water programme, also in Manitoba, in which victims seem to have felt "pressured to have the case heard by the community program rather than in criminal court; [concerned at] receiving too little information about the process to be followed; and a lack of support from the community" (Griffiths 1999: 293). Griffiths also specifically drew attention to the "competing and conflicting goals in community justice" and the difficulty of achieving community consensus, quoting the concerns expressed by La Prairie:

> On the one hand, community justice is about autonomy, empowerment, and control. On the other hand, community justice is about tradition, and, in contemporary terms, about 'healing' and the transformation of communities into healthier states of being. The reality, however, is that the primary goal of community justice is the exercise of social control, the use of surveillance, and the dispensing of 'justice,' which may or may not involve punishment ... the potential for community justice to divide rather than unite

> people, particularly where communities are small in size and geographically isolated, is great (Griffiths 1999: 293, quoting La Prairie 1996: 127).

In this context, there have been other expressions of concern about aboriginal community justice in the context of wife assault; according to Evelyn Zellerer, "when gender *and* culture are considered in terms of the responses to wife abuse, difficult challenges are raised" (Zellerer 1999: 345). In her study of community members' perceptions of wife abuse in the Baffin region, including their views about appropriate strategies for intervention in a community justice context, she identified several key areas of concern, including recognition (or the lack of recognition) of family violence as a priority among aboriginal leaders. As she noted, the *Report of the Aboriginal Justice Inquiry in Manitoba* concluded that aboriginal chiefs and councils, as well as aboriginal government leaders, had failed to deal with issues of domestic abuse (Zellerer 1999: 349, quoting *Aboriginal Justice Inquiry* 1991). As well, she pointed out the need to take account of "needs" of victims, as well as of offenders, in community justice; and of the impact of power relationships within communities: "Care must be taken to ensure that family networks and power structures do not perpetuate the victimization of women" (Zellerer 1999: 351).[32] Zellerer also expressed concern about conflicts inherent in traditions of respect for aboriginal elders, when elders do not take wife abuse seriously enough, as well as the ways in which aboriginal cultural values might diminish the significance of wife abuse:

> Cultural prescriptions against interference and confrontation have important implications for responses to violence. The data from this study suggest that Inuit feel uncomfortable participating in a process that involves community residents passing judgment in a public forum on another resident. This may hinder the ability of community residents to mediate and resolve disputes in their own communities and may increase women's vulnerability. It may mean that an entirely different approach to crime will be created or recreated from traditional times, one obviously different from

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[32] As Roach also explained, "stated in the abstract, the conflict between Aboriginal justice and crime control is great.... Aboriginal-justice initiatives that took on cases of serious crimes, especially sexual assaults, were vulnerable to public criticism that they did not take crime seriously enough" (Roach 1999: 272).

> the criminal justice system but perhaps also one different from our current conceptions of restorative justice (Zellerer 1999: 354).

Similar concerns were identified by Griffiths and Hamilton, who suggested that communities might be unwilling to assume responsibility for offences involving sexual assault and violence, having regard to the needs of the offenders and victims, but also the needs of the community. As they concluded, "Caution must be exercised in expecting or assuming that communities have the interest and/or expertise to respond, treat and control offenders convicted of acts involving violence and sexual assault" (Griffiths and Hamilton in Galaway and Hudson, eds. 1996: 188). Interestingly, Jean Lash similarly criticized the Supreme Court's decision in *R. v. Gladue* for its failure to recognize the accused as an aboriginal *woman*, and the victim of wife abuse (Lash 2000: 85).[33] In such a context, the needs of aboriginal *women* may be equally ignored by both the traditional criminal justice system as well as in restorative and community justice initiatives. Thus, while there may be substantial consensus that the "needs" of aboriginal accused can be met more effectively within a holistic aboriginal justice system,[34] the "needs" of victims of violence may require careful attention to underlying values within traditional processes of aboriginal justice.

2.3 The "Needs" of Offenders in Criminal Justice Processes

> The conclusion of those who have studied our criminal justice system is that it discriminates against the poor and harms as many people as it helps. Instead of developing effective ways of dealing with conflicts within our families, our schools and our communities, we dump all our disadvantaged social misfits into the criminal justice system, where they are repeatedly warehoused and then thrown back into the street. Instead of dealing wisely with the near-universal tendency of adolescents (especially boys) to commit minor criminal offences, we arrest thousands of low-income young men and lock them up with experienced criminals who give them advanced lessons in

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[33] Quoting from the report of Justice Ratushny on the pressures which may force a woman to plead guilty to a charge of manslaughter when she has killed her abusing male partner, Lash concluded that *Gladue* is not sufficiently responsive to the needs of aboriginal *women* accused in the context of wife abuse (Lash 2000: 85).

[34] See also Heino Lilles' comments that there have been quite a few community justice initiatives in Canada, but the great majority have "withered on the vine" for lack of support; since there is "very little hard information as to how well these initiatives did, as compared to the formal justice system," there is a need for proper evaluation: evaluation which can compare "the results with what the formal justice system would achieve with similar cases" (Lilles in Healy and Dumont, eds. 1997: 246).

> crime. The Canadian criminal justice system is not only unjust but also an abysmal failure that pushes young people into crime instead of helping them to stay out of it (National Council of Welfare 2000: 3).[35]

In its detailed report on issues about policing, bail decisions (including conditional releases), and sentencing, the National Council of Welfare identified how neutral principles work to effect discriminatory treatment for accused persons who are poor, and especially for visible minorities who are poor. At the outset, the NCW's report, *Justice and the Poor*, suggested that studies about the propensity for committing crimes remain inconclusive; although some early studies linked socio-economic background to criminal actions (people from poor neighbourhoods were more likely to commit crimes), the NCW report identified two recent Ontario studies which found that money worries played only a minor role in relation to criminal activity. The studies examined family characteristics of incarcerated adolescents and found that the most prominent factors were "physical abuse between the parents and toward the children, family breakdown with estranged fathers, and excessive drinking by the parents and the children" (National Council of Welfare 2000: 7, quoting studies by Ulzen and Hamilton 1998; and Shamsie, Hamilton and Sykes 1996). Other studies have revealed connections between crime and unemployment; "kin-based job networks" (family connections which allowed adolescents to find jobs and build legitimate careers) were identified as "a crucial factor distinguishing young delinquents who later reformed from those who continued to commit crimes into adulthood" (National Council of Welfare 2000: 7, quoting Hagan 1993). As well, youth who live on the street are more likely to be involved in criminal actions because street culture is often conducive to committing crimes; at the same time, it appears to be significant that large numbers of young people who end up on the street come from broken families and have histories of abuse by their parents or foster parents. As Hagan concluded, "many children abused and neglected by their families are forced out on the streets where they are then abused by our legal system" (National Council of Welfare 2000: 9, quoting Hagan 1994).

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[35] In the context of its brief on the issue of mandatory minimum sentences, the Canadian Association of Elizabeth Fry Societies stated that "Aboriginal people, other racialized people, and poor people face a criminal justice system in which discretion is exercised to their disadvantage at every turn, from the investigatory and charge stage by police, to the prosecutorial decisions made by Crown attorneys, to the trial and sentence decisions by judges, to the penal practices, including discipline of prison authorities, through to the parole determinations made by the parole board": see Canadian Association of Elizabeth Fry Societies, *Reforming Criminal Code Defences: Provocation, Self-Defence and Defence of Property* (Ottawa: CAEFS, 1999) 9.

In such a context, questions about the needs of those involved in criminal activity must take account of the broader circumstances of their lives. The studies suggest that large numbers of young people, especially young men, may engage in activities which violate the law, and many of them are likely to have little familial support - and even a history of past familial abuse - as well as no job or much prospect of obtaining employment. Arguably, their needs include social supports in terms of education and employment opportunities and a chance to build trusting relationships. Indeed, as the NCW report noted, lack of employment may affect an offender's eligibility for bail and their sentence if convicted; and the fact of a criminal conviction may well affect their subsequent ability to find employment. In such a context, it is not difficult to conclude that the traditional criminal justice system may not respond appropriately to the "needs" of the accused, and that other alternatives which can look at the whole person, not just the isolated criminal act, may offer more to the accused and perhaps also to the community. Instead of the usual response of the criminal justice system: arrest, a bail hearing, and a guilty plea or finding of guilt, and sentencing (including possibly incarceration), responses may be tailored to the more fundamental "needs" of the accused (Griffiths 1999).[36] After examining the exercise of police discretion, decision-making in bail hearings, and sentencing, *Justice and the Poor* concluded that there was evidence that poverty systematically disadvantages accused persons in the traditional criminal justice system. In such a context, it is at least arguable that restorative justice practices may ameliorate some of these problems, an issue which is addressed more fully in chapter 3. In relation to proposals for replacing traditional criminal justice with restorative justice programmes, however, there are three general issues which are addressed here.

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[36] In one such situation, for example, a man with a record of youth and adult convictions for assault and break and enter was once again charged with break, enter and theft. The Crown Attorney wanted a period of incarceration. Instead, the case was handled by a restorative justice programme, which recommended: a suspended sentence, with supervision to be carried out by the restorative justice programme; completion of an Interpersonal Communication Skills Course; completion of an Addictions Foundation of Manitoba assessment and regular attendance at Alcoholics

The first issue is the differential enforcement of youth and street crime on one hand, and white-collar crime on the other. As the National Council of Welfare reported, white-collar crime is committed primarily by persons with good educations and good jobs: tax fraud, embezzlement, securities and antitrust violations, and criminal negligence arising out of violations of occupational health and safety provisions. White-collar criminals "are responsible for more deaths and steal much more money than the poor, but are seldom called criminals and are seldom condemned by a society in

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Anonymous; the completion of conditions as outlined in the mediation agreement; and literacy training. The plan was accepted by the judge (Griffiths 1999: 281-382). This example shows how the plan adopted by the restorative justice process attempted to respond to the "needs" of the accused, needs which were arguably much more complex than just the criminal charges he faced. Although the accused was 32 years old at the time, his record of offending as both a youth and an adult revealed a pattern of criminal activity, warranting more and more serious responses within the criminal justice system. By thus "diverting" this case from the court docket, it is arguable that both the accused and the community benefitted more than by sending the accused to jail; moreover, the cost of incarceration was also avoided; in this way, restorative justices practices appear to offer considerable scope for responding to the "needs" of accused persons and communities (Griffiths 1999).

which many people believe that 'greed is good'" (National Council of Welfare 2000: 11, quoting Braithwaite 1992). In addition, because poor people are less likely to be able to pay fines, they are more likely to be imprisoned for non-payment of fines than middle-class Canadians. In recommending a principle of "equality" for the criminal justice system, therefore, the National Council of Welfare suggested that the impact of the criminal justice system should be substantially the same, "regardless of ... gender, age, race, sexual orientation, national or ethnic origin, religion, employment or family status, income, social class, physical or mental disabilities or place of residence within Canada" (National Council of Welfare 2000: 103). In particular, the NCW report recommended the adoption of the system of "day-fines" in which the amount of a fine is determined by a combination of the seriousness of the offence and the income available to the accused (National Council of Welfare 2000: 115). The study also recommended equality of treatment for white-collar criminals. In exploring how executives who foster life-threatening working conditions are not so different from bank robbers who panic and kill someone, and rich men cheating on their income tax are not so different from poor mothers who cheat the welfare department, *Justice and the Poor* quoted a story told by Roland Penner, former Attorney-General of Manitoba:

> Let's suppose I became philosopher-king and I could make any changes I wanted. Suppose I decided that minor social control offences and crimes without victims were to be eliminated from the Criminal Code. Also suppose that minor property offenders were to be dealt with in the community rather than in jails. At the same time suppose that I made tax evasion, knowingly polluting the environment, false advertising, fraudulent bankruptcy, and price-fixing crimes which carried automatic jail terms. Now, let's introduce the proverbial "man from Mars" who always gets into stories like this one. He arrives and I take him on a tour of (the provincial jail near Winnipeg). What would he say? "You sure have a problem with your middle-class White people, don't you?" (National Council of Welfare 2000: 27, quoting Harp and Hofley, eds. 1980).

Penner's story underlines how the definition of criminal activity, as well as policies about enforcement - including issues of differential enforcement in relation to the poor - may have dramatic implications for how we define the problems of offenders in the criminal justice system. In this way, it is important for both traditional criminal justice processes as well as restorative justice initiatives to take into account this broader policy context.

The second issue is the connection between "needs" of accused persons and the definition of criminal activity itself. Before deciding that the most appropriate response to criminal activity is restorative justice, it may be important to determine whether there are too many activities which are currently labeled "criminal." As Ron Levi argued, "often as a result of zero tolerance policies and other 'get tough' measures, youth are brought before the criminal justice system for activity that can often be dealt with otherwise" (Levi in McCamus, Ontario Legal Aid Review 1997: 758). The National Council of Welfare also noted the relationship between the number of police officers and population figures in different communities: increasing the number of police in some communities resulted in immediate "crime waves."[37] Similarly, the NCW report suggested that legislation such as Ontario's *Safe Streets Act*,[38] and city bylaws which limit the activities of beggars, may increase the numbers of accused persons charged with criminal offences. Indeed, in its 1995 study of legal aid, the National Council of Welfare noted the impact of several offences related to activities which are proscribed *in public*, "including drinking on the street,... shouting, swearing, loitering and being obnoxiously drunk":

> Such laws have a much greater impact on the poor, some of whom are homeless and many of whom spend a great deal of time on the street or in other public places to stay out of their overcrowded homes. In Canada in 1992, these laws were used to lay more than 100,000 charges against men and over 10,000 against women, reminding us of the famous saying: "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets ..." (National Council of Welfare 1995: 6).

Thus, in determining how to respond to the "needs" of criminal accused, particularly those who are young and poor, it is possible to consider restorative justice practices as alternatives to the traditional criminal justice system. However, it is arguably just as important to re-examine the kinds of activities which are labeled "criminal" to determine whether de-criminalization of some activities might alleviate the need for a criminal justice system response altogether. In this context, one of the guiding principles for criminal justice proposed by *Justice and the Poor* was "restraint," the idea that the justice system should refrain from intervention.[39] Of course, there may still be a need for better supports for offenders, especially youth, whose family and employment situations impact on their ability to achieve independence effectively. The fundamental question is whether labeling their activities (and these accused) "criminal" is the most effective way to achieve these goals. Another way of looking at this question is to ask to what extent community resources which were once available to assist young people, and which were withdrawn in the 1990's, are now being redeployed (perhaps only partially) to restorative justice programmes as a result of the change in definitions of criminal activity.

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[37] As Roach argued, "the under-policing thesis should be approached with caution. Mary Hyde has suggested that 'the dependency of native communities on police for services, not otherwise available on reserves, results in high police to population ratios, increases the likelihood of police interventions and 'criminalizes' behaviour that would not otherwise be criminal if other agencies were involved.' Adding more police may only increase Aboriginal overrepresentation in prison" (Roach 1999: 264, quoting Hyde 1992: 370).

[38] The *Safe Streets Act* provides for a fine of up to $500. for the first offence, and a fine of up to $1000. or up to 6

In this context as well, it may be important to take account of a third issue: the characteristics of offenders, including gender and race. As Maureen Cain and others have suggested:

> "[The] most consistent and dramatic findings from Lombroso to post-modern criminology is not that most criminals are working-class ... but that most criminals are, and always have been, men. Instead of asking how the maleness of men connects with this result, ... we ask why women do not offend, as if even the criminogenic properties of maleness were normal compared with the cheerful and resigned conformity of women. This is because the *criminological* gaze cannot see gender; the criminological discourse cannot speak men and women (Cain 1989, as quoted in Walklate 1995: 20-21).

Although the rate of criminal activity for women remains lower than that for men, there is some evidence that the number of women offenders has increased in the United States. In a 1998 report, for example, concern was expressed about the increased number of women offenders and the failure to meet their "needs" in the American legal system and especially in prisons:

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months in prison or both for the second offence.

[39] "Every Canadian report on the criminal justice system ... emphasized the importance of restraint. In its broadest sense, restraint implies a) that the criminal justice system should not interfere in people's lives unless intervention is necessary to protect other people from harm; and b) that the justice system should not be used to accomplish tasks that would be better done by other institutions...." (National Council of Welfare 2000: 103).

> Evidence shows that greater emphasis should be placed on the concerns of and programs for adult female offenders. In 1995, more women were arrested, convicted, and sent to prison than ever before; female offenders made up 6.3 percent of the state and federal prison populations, an increase from 3.8 in 1975. The nature of the crimes women are convicted for today has also changed. In 1975, women were most likely to be incarcerated for crimes such as larceny, forgery, embezzlement, and prostitution. In 1995, an increasing percentage of women were sentenced to prison for drug offenses. Unfortunately, this increase in the number of female offenders has not been matched by enhanced attention to specialized programs geared particularly for women.... This is especially true in light of the criminal justice system's recent adoption of a more punitive philosophy (National Institute of Justice 1998: vii).

The National Institute of Justice's report included similar concerns about female juvenile offenders, concluding that "girls are still seriously neglected by the juvenile justice system" (National Institute of Justice 1998: viii). Although there appears to be little analysis of differences between young women and young men who are in trouble with the criminal law in Canada, there have been some suggestions that restorative justice interventions may need to be designed to meet the specific "needs" of young women offenders (Pepi 1998: 85).

According to Dianne Martin, female offenders in Canada are broadly typical of female prisoners throughout the western world: they are "generally poor, young, white, single mothers with few, if any, previous convictions": they are involved in minor crimes such as shoplifting, prostitution, and drug-related offences. As well, "the majority are also survivors of violence" (physical or sexual abuse, or both) (Martin in Roberts and Cole, eds. 1999: 190-191). As Martin noted, a substantial proportion of women offenders are also poor; indeed, she characterized welfare fraud as "a woman's crime":

> There are many reasons for this situation. The increase in the need for social assistance caused by the recent recession has been accompanied by the usual increase in resentment expressed toward recipients. This resentment translates into support for harsh punishment for those who break the rules, even where the offence is motivated by "need not greed," and where poverty and privation have compelled a recipient to fail to disclose the contributions of a boyfriend or the extent of part-time employment earnings. In these difficult cases, pitiful and understandable circumstances seem to cry out for

> mercy, but the mercy received is often minimal and a jail sentence is a real risk (Martin in Roberts and Cole, eds. 1999: 193).

Martin's analysis is confirmed by the statistics of persons charged for 1994. Although 55% of persons charged with prostitution were women, the percentages of women charged for other offences were relatively small, except for the offences of fraud (30%) and theft under $1000 (33%) (Martin in Roberts and Cole, eds. 1999: 193, quoting from *Commission of Inquiry into Certain Events at the Kingston Prison for Women* 1996: 205). Thus, it appears that female offenders in the justice system may have needs because of their poverty, as well as because of their experiences of violence and abuse in the past.

Moreover, as the findings of the *Commission on Systemic Racism in the Ontario Criminal Justice System* demonstrated, there are also problems for offenders who are members of racial minorities in Canada. As the *Commission* concluded:

> The Criminal justice system operates through a series of highly discretionary decision making stages. Discretion is exercised in subtle, complex and interactive ways, which leave considerable scope for racialization to influence practices and decisions, and for bias to be transmitted from one stage of the process to others (*Commission on Systemic Racism* 1995: 105).

The *Commission*'s data revealed that there was significant over-representation of Blacks among accused in the Ontario criminal justice system.[40] As Frances Henry suggested, the *Commission's* report provided excellent research data to explain this overrepresentation of Black accused in prison - the result of the impact of imprisonment before trial, and the "differential treatment with respect to bail and other pre-trial measures" for Black accused (Henry 1996: 231). In her review of the

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[40] As Roach indicated:

> Over-representation is clear and stark. Black people account for 15% of prison admissions in Ontario, but only 3% of the province's population. The white adult admission rate to Ontario Prisons in 1992/93 was 706 per 100,000 while the Aboriginal and black admission rates were 1993 and 3686 respectively. The majority of the black, but not the Aboriginal, admission rate consists of unsentenced remand prisoners who have been denied bail.... The inquiry explains dramatic over-representation of black people in Ontario's prisons by social and economic inequality and by differential enforcement within the criminal process (Roach 1996: 239).

Commission's findings and conclusions, Toni Williams also emphasized how it is necessary to examine all stages of the criminal justice process to assess whether, and in what ways, racism affects decision-making about Black offenders. As she concluded in relation to theories about sentencing, moreover, it is possible that "cultural beliefs and assumptions about black people may implicitly shape judges' assessments of the individuals before them ... [especially when] judges are asked to assess intangible factors such as the attitude or personality of a convicted person" (Williams in Roberts and Cole, eds. 1999: 214).

In the context of such data, it is not surprising to find research which reveals that "members of many racial and ethnic minorities [in Canada] have strong perceptions that they are discriminated against by the criminal justice system" (Etherington 1994: x). Moreover, as Etherington suggested, there is a need to examine how discretion is exercised by prosecutors, and to develop guidelines to structure it, "including a directive that race or ethnicity not be a consideration in initiating plea discussions or in reaching a plea agreement" (Etherington 1994: xiii). In reviewing a range of reports about discrimination in the justice system, Etherington reported a degree of consensus about measures to address these problems.[41] However, he suggested as well that problems within the criminal justice system are often linked to broader concerns about racial discrimination in Canadian society. As Etherington explained:

> The criminal justice system does not exist in isolation and many of the barriers to access to justice faced by minorities originate in institutions which are generally perceived to be extrinsic to the criminal justice system. Where individuals are rejected by, or perceive rejection by dominant groups in society, the potential for conflict between them and the values of the majority may increase. It is critically important to ask whether or not the broader non-criminal justice system provides access to justice to racial and

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[41] "There is a significant uniformity in the reports for measures to address concerns about racism and discrimination in the exercise of discretion within the justice system. The four types of measures most often repeated are an increase in minorities as justice system actors at all levels; implementation of cross-cultural and anti-racism training for justice system actors; community liaison programs to improve relations between system actors and minority communities; and monitoring bodies or complaint agencies to uncover abuses and to provide access to remedies to minority community members" (Etherington 1994: xiv). Suggestions for better cross-cultural understanding on the part of lawyers were analyzed in detail as well by Michael Wylie, who concluded that legal services in a multi-cultural Canada require lawyers to understand the cultural context within which an individual client's problem is presented. See Wylie "Enhancing Legal Counselling in Cross-Cultural Settings" (1996) 15 *Windsor Yearbook of Access to Justice* 47.

> ethnic minorities in their pursuit of economic and social justice or their attempts to gain redress for wrongs suffered in those areas of activity (Etherington 1994: xix).

Like Etherington, the National Council of Welfare's 1995 report also drew attention to the need for broader measures to prevent offending behaviour, particularly for young males. The report identified the success of a sports camp for young aboriginals in northern Manitoba and preschool programs in Michigan, both of which resulted in a decrease in criminal activity on the part of teenagers (National Council of Welfare 1995: 75). As these broader approaches to criminal activity reveal, the "needs" of offenders may encompass matters that go beyond individual acts of criminal offences, and they may need to take account of issues of poverty, gender and race - and the interrelationship of these characteristics for some offenders. In this way, the "needs" of offenders may require quite specific responses from the criminal justice system, whether it is the traditional system or one that embraces restorative justice.

2.4 The "Needs" of Victims and Communities for Justice

As explained, there has been a marked increase in recognition of the "needs" of victims in the criminal justice system in recent decades. These developments reflect earlier stages of criminal justice, prior to the creation of state-organized processes which clearly demarcated criminal justice as "public" and different from "private" civil claims. In a 1985 study of alternatives to criminal courts, Tony Marshall provided an analysis of the "needs" of victims in the criminal justice process. According to Marshall, victims suffer two kinds of losses: 1) material losses, including loss of money or property, or physical injury; and 2) emotional losses, including feelings of anxiety, insecurity or "pollution." However, as he noted, the criminal justice process is not well-designed to respond to either of these needs of victims. In relation to material losses, for example, the criminal justice system conceptualizes the offender's actions as primarily creating a "debt to society," so that it is "not well geared to helping out the victim financially" (Marshall 1985: 20). As well, the victim's emotional needs can be met only if the state can ensure that the offender is punished.

Perhaps more importantly, Marshall suggested that victims' participation in criminal proceedings (as witnesses, for example) may actually "reinforce victims' sense of powerlessness arising from the initial criminal experience and further add to their dissatisfaction or even distress" (Marshall 1985: 21).

The inability of the criminal justice system to meet these "needs" of victims is the basis for many claims about the potential for restorative justice. As Mark Umbreit suggested, for example, processes of victim-offender mediation can hold offenders accountable for their actions and emphasize the human impact of the crime on the victim, as well as providing opportunities for offenders to take responsibility for their crime by making amends to victims; in addition, victim-offender mediation can promote active involvement by victims and communities in the justice process and enhance the quality of justice experienced by both offenders and victims (Umbreit 1994: 5). In a similar way, Bazemore suggested that victim-offender mediation in relation to juvenile justice could better respond to the needs of victims, but that it could also respond more appropriately to the needs of *all* involved:

> But what may be the most unique insight of the restorative justice perspective is that advocacy for victims rights and involvement is not a zero-sum game. A focus on the needs of victims is therefore not incompatible with a concern with the needs and risks presented by offenders and with a concern with the general needs of communities. Restorative justice recognizes three clients ... in any "justice" process: victim, offender, and the community (Bazemore 1999: 299).

Although the processes of victim-offender mediation are considered in detail in chapter 3, it is important at this point to analyze how the "needs" of victims are defined - and the consequences that flow from such definitions in relation to the choice of processes to respond to these needs. In such a context, it is also important to consider the extent to which different processes, including the criminal justice system, priorize the needs of victims, and communities, in relation to those of offenders.

One way of ensuring that victims' "needs" have some degree of priority is the creation of Victims' Bills of Rights. Thus, Bacchus suggested that the enactment of *An Act Respecting Victims of Crime* in Ontario in 1996 represented "a significant step in acknowledging the needs of victims of crime in the criminal justice system," and resulted in requirements for Crown counsel to ensure the participation of victims in accordance with the statute (Bacchus in Roberts and Cole, eds. 1999: 219).[42] This emphasis on victim involvement in the criminal justice process has also been evidenced by assertions that victims' "needs" must be recognized as "rights." In their analysis of critical victimology, Mawby and Walklate emphasized that accused persons have "rights," and that the criminal justice system must therefore recognize that victims' "needs" are also "rights."[43] At the same time, they argued that there remain many unmet needs for those who do not fit current notions of "victims," and that it is critical to recognize how structural inequities in society fundamentally affect criminal victimization (Mawby and Walklate 1994: 169). Mawby and Walklate identified four areas where "rights" for victims need to be improved: the right to play an active role in the criminal justice system (including mandatory victim impact statements); the right to knowledge about the progress of the case against an accused and the right to compensation; the right to financial help (including insurance schemes and the assistance of police); and the right to advice and support from state-funded agencies.

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[42] As Bacchus explained, "Crown attorneys are directed to ensure that the interests of victims of crime are brought forward at every stage of the prosecution to a degree consistent with the primary role of a prosecutor, although comments of the victim that are not relevant to issues of sentencing should not be placed before the court. As a result, Crown counsel is sometimes required to act as a screen or filter for the concerns of the victim and *must balance the victims' right to dignity and some level of participation in the process with the Crown's function as an officer of the court*" (Bacchus in Roberts and Cole, eds. 1999: 219-220, emphasis added).

[43] In his review of victims' rights, Roach concluded that "although they achieved some recognition, the rights of crime victims [in Canada] were more fragile than either the rights of the accused or the rights of the disadvantaged groups who claimed equal protection of the criminal law. Part of the reason may be found in the Charter, which entrenched both due process and equality rights, but not the rights of crime victims.... Crime victims have had some

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impact on the criminal process, but it was limited and contested" (Roach 1999: 309).

There are also some studies which define the "needs" of victims in relation to the benefits of restorative justice, at least on the basis of victims' responses to such programmes. For example, Umbreit *et al* identified a number of studies which seem to confirm victims' preference for victim-offender mediation programmes in the United States.[44] For the victims in these surveys, it appears that there was a serious "need" to confront the offenders face-to face. The authors suggested, moreover, that victim-offender mediation might meet the needs of victims, not only in crimes of property and minor assault but also "in crimes of severe violence, including murder;" at the same time, the authors identified a need for much more research and assessment with larger samples before any firm conclusions can be drawn. Indeed, they recommended caution, suggesting that "many unintended negative consequences could result from such initiatives, including a significant re-victimization of the victim" (Umbreit *et al* 1999: 340). In this context, it may be significant that the authors also stressed the usefulness of restorative justice to meet not just the needs of *victims* but also those of *offenders* and *communities*:

> At its core, the process of victim-offender mediation and dialogue in crimes of severe violence is about engaging those most affected by the horror of violent crime in the process of holding the offender truly accountable, helping victims gain a greater sense of meaning, if not closure concerning the severe harm resulting from the crime, *and helping all parties to have a greater capacity to move on with their lives in a positive fashion.* This emerging restorative justice practice certainly warrants further development and analysis, along with an attitude of cautious and informed support (Umbreit *et al* 1999: 340-341, emphasis added).

The benefit of restorative justice practices for *communities* has been identified as a major impetus for their adoption in Australia. In a review of three case studies in the Wagga Wagga model, O'Connell identified the need for such practices in order to re-establish "community":

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[44] "Today it is very clear, from empirical data and practice experience, that the majority of victims of property crimes and minor assaults presented with the opportunity of mediation chose to engage the process, with victim participation rates often ranging from about 60-70% in many programs. A statewide randomized public opinion survey in Minnesota found that 84% of citizens, including many who had been victimized by crime, indicated they would be likely to consider participating in victim offender mediation if they were the victim of a property crime.... A more recent statewide survey of victim service providers in Minnesota found that 91% felt that VOM was an important service to be made available to victims on a volunteer basis and that it should be offered in each judicial district of the state" (Umbreit *et al* 1999: 322).

> Conferencing is about re-creating community, one that is critical to assist us make sense of a world that has experienced significant social change over the past 40 years.... [All] those involved [in criminal justice] at some stage experience some "disconnection" from community.... [The] conference process allowed those communities to be strengthened and ... individuals to re-connect with those who are significant in their lives. These experiences raise questions about our increasing reliance on professionals ... (working in relative isolation) to assist communities re-establish themselves in the aftermath of any disruption that threatens social cohesion (O'Connell in Healy and Dumont, eds. 1997: 143).

Although it may not be appropriate to design restorative justice practices with the "needs" of *only* victims in mind, it may be important to have a clear understanding of the relationship among competing demands within such processes. Particularly where there may be conflicts or inconsistencies between the "needs" of victims, and the "needs" of communities or of offenders, it is important to implement protocols for defining the compromises that may be appropriate to meet the "needs" of these different interests. For example, the *Criminal Code* reforms (Bill C-41) which codified the rights of victims to participate in sentencing hearings, and which set out provisions for restitution of victims, for the introduction of victim impact statements, and for victim fine surcharges appear to have provided victims with more involvement in the traditional criminal justice process; as Sandra Bacchus suggested in her review of these provisions, however, it is possible that attentiveness to the "needs" of victims may result in more conditional sentences in order to improve the potential for offenders to be able to provide restitution to their victims (Bacchus in Roberts and Cole, eds. 1999: 225, quoting *R. v. Visanji et al*[45]). In this way, implementing victims' needs for restitution clearly affects the scope of sentencing of offenders. Moreover, balancing the "needs" of victims and offenders will be necessary in restorative justice processes as well as in the traditional criminal justice system. In this way, it is also important to note that there are others who may be harmed, in addition to the victim, including the offender (Llewellyn and Howse 1998).

In this context, the gender of victims may also be an important factor in meeting victim "needs." As the National Institute of Justice report in the USA indicated in 1994, "women were victimized about five times more often than men by persons with whom they had intimate relationships - spouses, former spouses, or boyfriends/girlfriends" (National Institute of Justice 1998: viii). Comparing the treatment of female victims of crime in 1975 to 1995, the report concluded that there had been some positive changes in the criminal justice system's response to female victims of crime: the criminalization of domestic violence, the establishment of sexual assault treatment centres, the enactment of victims' bills of rights, and the passage of the *Violence Against Women Act* in 1994. All the same, the report concluded that:

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[45] *R. v. Visanji, Lall, and Akbar* (unreported) Ont. Ct. Prov. Div., 2 July 1997.

> Despite these changes, current data on violence against women illustrate the need for additional measures such as a coordinated and integrated approach to reduce and prevent victimization of women. A coordinated approach to this problem suggests collaboration among law enforcement, prosecution offices, and the courts, as well as victim advocates and service providers. For the criminal justice system's response to be effective, professionals within the system should share a vision that prioritizes the safety and well-being of female victims (National Institute of Justice 1998: 56).[46]

There have been some efforts to respond to these "needs" within the traditional criminal justice system in Canada, including specialized courts for prosecuting child abuse cases and domestic violence cases. These courts offer specialized personnel, as well as coordination among social agencies and prosecutors. Yet, as a number of studies in Canada have revealed, the criminal justice system does not provide a safe and effective response to women who are victims of intimate violence. In a study of access to justice for abused immigrant women in New Brunswick, for example, Miedema found that there were strong religious and cultural constraints within immigrant families which made it difficult, if not impossible, for women to seek help in relation to problems of violence on the part of their spouses: "the fear of shaming or bringing dishonor to the family (husband) was a very powerful social control mechanism preventing women from seeking help in case[s] of abuse" (Miedema 1996: 7). In a related study, Miedema and Wachholz concluded that:

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[46] The National Institute of Justice report also explained how, even when victims' rights are recognized, "they may not be enforced and there are few sanctions for failure." The report described a request by Mary Byron of Jeffersontown, Kentucky to be notified when her estranged boyfriend, who had been charged with raping her at gunpoint, was released from detention. Unfortunately, she was not notified and her estranged boyfriend murdered her. Her estate sued the Jeffersontown Police Department and the detective who had failed to notify her, but the suit was dismissed. On appeal, the court held that there was no duty to notify Byron of her estranged boyfriend's release (National Institute of Justice 1998: 45, citing *Lexington Herald-Leader*, 13 July 1996).

> The vast majority of participants identified the interplay of cultural norms and structural oppression as very profound barriers to the justice system for abused immigrant women. All the women ... described their social life as deeply rooted in patriarchal structures. Many women ... indicated that the norm of defining abuse as a private, personal matter in conjunction with the fear of bringing shame to their family meant they were often very reluctant to contact the justice system. Structural constraints, such as language barriers, perceived racism in the criminal justice system and social service agencies, and lack of adequate ethnocultural services and representation, were also identified as disincentives to seeking help in cases of abuse (Miedema and Wachholz 1998: 29, citing Currie 1995).

These concerns are similar to those identified by Martin and Mosher, who suggested that there was a neo-criminalization reform policy for wife assault in the two decades from 1970 to 1990. However, they concluded that "the evidence is compelling that the neo-criminalization strategy [failed] individual women;" as they explained, "an aggressive criminal justice response exposes individual women to harms of a variety of sorts, and offers, only in some cases, potential benefits" (Martin and Mosher 1995: 37).

Martin and Mosher proposed a more complex strategy, one that "neither homogenizes the experiences of abused women, nor denies them the status of rational agents competent to exercise choice in their own best interest" and which recognizes that criminal justice intervention may be only one of a multitude of services and interventions which may be necessary (Martin and Mosher 1995: 43, citing Sheptycki 1991). Such an approach reveals that there may be different "needs" for victims of different kinds of criminal actions, especially in relation to gender; and that even among the victims of wife abuse, there may be different "needs" on the part of individual women because their circumstances differ. Overall, however, in the context of the "needs" of women who are victims of intimate violence, there is evidence that the current rate of reporting is extremely low. Using data from the 1993 Canadian Violence Against Women Survey, Gartner and Macmillan concluded that "police learned of these victimizations relatively rarely, only about 15% of the time" (Gartner and Macmillan 1995: 405). In assessing the scholarly debates about whether increased reporting would respond better to women's needs, however, Gartner and Macmillan were undecided; yet, as they emphasized, their study confirmed "the extent to which crimes of violence against women continue to exist outside of the law's domain" (Gartner and Macmillan 1995: 423).[47]

These concerns about the failure of the criminal justice system for women who are victims may also apply to some victims who are members of visible minorities. As Barbara Hudson suggested, some women and some Blacks who are victims may have difficulty engaging the criminal justice system because they do not fit the construction of the "ideal victim"; for example, this problem has affected "prostitute women or other independent, sexually-active women, attempting to bring rape charges" (Hudson 1998: 244). Moreover, for Hudson, it is important to take note of the differing responses of the criminal justice system to racial and sexual crimes on one hand, and "the street crimes of the powerless": while the latter have been taken seriously and "over-penalized," the former have all too often been ignored:

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[47] At the same time, it is important to recognize that proposals for innovative intervention strategies within the criminal justice system, perhaps especially in relation to gender issues, may provoke strenuous opposition, as was revealed in the decision of students to alter their approach to legal aid services for abused women in Ottawa: see Ruth Carey "Useless (UOSLAS) v. the Bar: The Struggle of the Ottawa Student Clinic to Represent Battered Women" (1992) 8 *Journal of Law and Social Policy* 54.

> In other words, the censuring, moral-boundary-declaring, symbolic purposes of criminal law have already been served in relation to these latter types of offences, whereas with racialized and sexualized violence, the symbolic force of criminal law has only recently, and only partially (especially in the case of racial violence) been deployed to demonstrate that society, at least in its official organization, disapproves of these forms of behaviour (Hudson 1998: 245).

For Hudson, it is also important to acknowledge how power relationships within society affect the commission of crime. She suggested, for example, that social inequality which "pushes so many young men into economic marginality" may prompt them to use violence to establish their claims to racial and gender superiority. As a result, she argued that differential power relationships are completely different in domestic, sexual and racial crime, by contrast with property offences and other kinds of "economic survival" crimes. Thus, she expressed concern that victim-offender mediation processes, which make the relationship between victim and offender central - displacing the relationship between offender and the state - may "reproduce and reinforce the imbalance of power of the crime relationship, rather than confronting the offender with the power of the state acting on behalf of (in the place of) the victim" (Hudson 1998: 247). Moreover, while recognizing the victim's "need" for community disapproval of the offender's actions, Hudson questioned the real possibility of *community* shaming:

> ... [Most] of us now inhabit not 'communities,' but shifting, temporary alliances which come together on the basis of private prudentialism. Residents' associations; parents' associations; city-centre rate-payers; shopping-mall retailers; share-holders' meetings; women's groups: these are the kinds of collectivities which claim people's allegiances now, rather than communities. The weakest point of [restorative justice] is ... what is the community; what is the community interest, and how can it be represented? Without the concern to make safer communities, restorative justice is in danger of merely substituting civil justice for criminal justice. Without the community, restorative justice is reduced to the competing perspectives of the victim and the perpetrator, and there is no social group with reference to whom the offender can experience either shame or reintegration.... To serve the expressive functions of punishment, restorative processes will have to devise ways of clearly separating condemnation of the act from the

> negotiation of measures appropriate to the relationships between the particular victim, the offender, and the community (Hudson 1998: 251-253).

Like Martin and Mosher, however, Hudson also acknowledged how "get tough" policies in relation to sexual (and racial) violence may not be solved within the current criminal justice system: "penal toughness towards racial, sexual, and domestic violence would only be inflicted on the poor and marginalized, with the powerful continuing to perpetrate their racist and misogynist behaviour behind closed doors." Penal toughness will thus lead to "the rich getting counselling and the poor getting prison" (Hudson 1998: 155).

These comments reveal the political content of discussions of victims' "needs." As Walklate suggested, there has been a convergence between women's advocates (who have drawn attention to the rate and seriousness of crimes of violence against women) and political needs to demonstrate "get tough" policies in relation to crime (Walklate 1995: 33). Similarly, David Garland has argued that current punitive policies have been shaped, at least in part, by a linkage with the interests and feelings of victims:

> [Actual victims], victims' families, potential victims, the projected figure of 'the victim' - are now routinely invoked in support of measures of punitive segregation. American politicians announce mandatory sentencing laws and are accompanied at the podium by the families of crime victims. Crime victims are featured speakers at British party political conferences. Measures are named for victims ... The new imperative is that victims must be protected, their voices heard, their memory honoured, their anger expressed, their fears addressed. The rhetoric of penal debate routinely invokes the figure of the victim.... A political logic has been established wherein being 'for' victims automatically means being tough on offenders. A zero-sum policy game is assumed wherein the offender's gain is the victim's loss.... [What] is insufficiently acknowledged is the degree to which the figure of the victim has come to have the status of a 'representative individual' in contemporary society (Garland 2000: 351).

As Garland's analysis suggests, the "needs" of individual victims have been appropriated, indeed transformed, by political rhetoric into the "representative needs" of victims. In this way, the focus on victims' "needs" may have contributed to a "get tough" political agenda by providing added support for more and longer periods of incarceration. In such a context, the real needs of actual victims may be less important, even ignored. Moreover, the rhetoric may create a need for those who claim that restorative justice provides a viable alternative to exercise care not to be captured by a "get tough" political agenda and to define the real "needs" of actual victims. Overall, victims' "needs," as well as the "needs" of offenders and communities (including aboriginal communities) appear to be both complex and contested in relation to the goals and values of criminal justice in Canada.

3 CHALLENGING THE MAINSTREAM: APPROACHES TO INCREASING ACCESS TO CRIMINAL *JUSTICE*

3.1 Introduction

In this Chapter we concentrate on the substantive responses to the questioning about and criticisms of the mainstream legal system discussed in Chapter 1.0, "The Concepts and Context of Criminal Justice: From *Access* to Justice to Access to *Justice*," and to the needs identified in Chapter 2.0, "Re-Assessing 'Needs" in Relation to *Access* and *Justice*." In discussing concepts and context, we identified the following issues raised by the current state of criminal justice: the appropriateness of the contemporary or modern distinction between civil and criminal justice; the implications of the public/private dimensions of justice; and the extent to which the criminal legal system is based on, recognizes or is able to respond to equality concerns. This last issue – equality – leads us to Chapter 2.0. There, in reassessing needs, we suggested that the concept of "needs" should encompass more than "legal needs" to include those related to poverty, gender, race, age and similar factors and, in a related way, to the needs of offenders, victims and communities. In this section, we consider how the responses are characterized both by a recognition of shifting boundaries between civil and criminal justice and between the public and private and by the necessity of incorporating an understanding of needs. In Chapter 4.0, we will return to these issues in a more critical way, asking not only whether the responses are able to answer the criticisms leveled at the mainstream system and whether they adequately incorporate equality considerations, but also whether they raise concerns of their own.

Specifically, we consider transformative justice, restorative justice and specific forms of the latter, namely victim-offender mediation, family conferencing and circle sentencing. In addition, however, it is useful to refer to some of the individual responses which have been put in place or have been considered in the literature; we have followed Van Ness in calling these initiatives "piecemeal" (1993: 257). We emphasize that "piecemeal" in this context does not mean "minor" or "insignificant," but rather reflects a lack of challenge to the most fundamental principles of the mainstream system as we identified them in our discussion of "The Concepts and Context of Criminal Justice" (treating crime as an offence against the state for which the offender must be punished following a finding or admission of guilt in an offender-centred adversarial system involving for the most part the offender and the state).

We begin with a discussion of the most "radical" conception of access to criminal justice.

3.2 Transformative Justice

"Transformative justice," an ambitious alternative to the existing civil and criminal legal systems, has as its goal the transforming of the system, the participants and their conflict. With respect to civil disputes, transformative mediation is directed at transformation of the parties' perceptions of each other and of their dispute (Bush and Folger 1994). This kind of mediation is said to provide an opportunity for the parties' moral development, as well as social change more generally. Its goals are to empower the parties and mutual recognition of their situations and "common human qualities" (Bush and Folger 1994: 84-85). In the criminal context, transformative justice poses a challenge to the conception that law's function is to provide "rules, procedures and institutions that facilitate just interactions between people," and to achieve "justice" "by controlling socially inappropriate behaviour that reveals itself in conflict." As one commentary declares, "the power of transformative justice [is] . . . the possibility of using the substance of conflict as a means of exploring options and establishing responses that are not only acceptable to all parties but develop and strengthen relationships among those involved" (Law Commission of Canada 1999). Conflict becomes a means by which the specific parties and society in general may change significantly and in that sense is potentially transformative.

Transformative justice envisions a radical new way of characterizing problems which in turn attract new responses. Thus if we define drugs as a criminal problem, we will apply criminal responses to it, with a primary emphasis on convictions for using or selling illegal drugs; if it is defined as a health problem, however, responses would emphasise prevention (Law Commission of Canada

1999). Once problems have been characterized as criminal, they are addressed within the criminal framework which in its retributive form means that wrongdoing is determined through a legal duel between the accused and the state, with particular emphasis on the rules which protect the accused; the victim is treated less as a participant than as a witness; the process is segregated from the community and historical context; and the object is to determine guilt and punishment (Kwochka 1996: 158; Delgado 2000).

It is useful to identify transformative justice as a distinct approach in order to highlight the sea change it would bring to our understanding of the concept of "justice," as well as the comprehensive changes required in both the civil and criminal systems. Nevertheless, there are those who view restorative justice as sufficiently challenging to the mainstream system as to be properly characterized as "transformative." In our view, such a characterization is premature. The concept and practice of restorative justice are broad, some would say too lax to be meaningful, and apply within the current system. We think that it would be a mistake to define restorative justice as necessitating transformation.

In practice, few, if any, restorative justice projects have achieved the power to transform either the criminal justice system or society, regardless of its perceived potential to do so. It responds to the mainstream's designation of acts as criminal and while it may affect the outlook of individuals or their relationship with each other, it is rarely directed at systemic transformation. Accordingly, while it may have the potential to transform, we disagree that its recognition of persons rather than laws is sufficient to support a claim that restorative justice is "*inherently* transformational" (Van Ness and Strong 1997: 175 (emphasis added)).

It is also important to maintain a distinction between "transformative" and "restorative" justice for another reason. As Kwochka points out, the latter assumes a pre-existing positive relationship while in fact the "original state [might have been] disrupted and dysfunctional," while transformative justice "suggests the ability to actually create change in individuals, families, and communities" (1996: 197, citing La Prairie 1994). For purpose of the following discussion, restorative justice will be treated as a distinct approach to the criminal legal system rather than as either a synonym for or sub-category of transformative justice.

3.3 Restorative Justice

3.3.1 Introduction

First referred to in 1977 (Marshall 1998, crediting Barnett 1977; Llewellyn and Howse 1998 and Van Ness and Strong 1997: 24, crediting Albert Eglash 1977), restorative justice is the predominant theme in the current literature and in government initiatives for increasing access to justice for offenders, victims and communities. Its proponents offer restorative justice as a preferable alternative to the current system on both efficacious and ethical grounds (Andrews, Zinger *et al* 1990; Gendreau and Goggin 1996; Kwochka 1996; Bonta *et al* 1998; Lewellyn and Howse 1998; Braithwaite 1999; Gay 2000).

As we indicated in Chapter 1.0, restorative justice recalls earlier systems, western and non-western, non-state (or acephalus) and state societies, which were identified with community-based justice and is contrasted with the state-centred, retributive justice system developed between the eleventh and twelfth centuries and the nineteenth century in western regimes (Llewellyn and Howse 1998; Weitekamp 1999); Blakely and Bumphus (1999) also discuss citizen policing in the United States and England as an example of community based justice. Victim offender mediation is generally considered to constitute the beginning of contemporary efforts at restorative justice, but initial victim-offender mediation programs during the late 1970s in Europe and North America, often begun in faith communities, tended to remain distinct experiments serving as an alternative to sentences, however, since the main objective was reparation to the victim. According to Braithwaite (1999: 1743), "[r]estorative justice became a global social movement [only] in the 1990s as a result of learning from indigenous practices of restorative justice the ways in which individualistic Western victim-offender mediation was impoverished." The major differences between indigenous and western practices were the role of the community and the significance of remorse and forgiveness

(Braithwaite 1999: 1743, 1744). According to Braithwaite (2000: 1), Canada has taken a leadership role in applying restorative justice principles. Canadian commentators have observed that "[t]he rise of restorative justice in Canada both in practice and public rhetoric has been quick" (Roach 2000; also see Griffiths and Corrado 1999: 273).

It has been observed that "it may . . . be doubted whether any unified 'restorative justice' movement exists," since "there appear to be a number of apparently similar, yet independent, 'alternative justice' movements and philosophies," using different names including transformative justice, peacemaking criminology, relational justice and community justice" (Bazemore and Walgrave 1999: 46). On the other hand, Weitekamp (1999: 75) maintains that the terms "restitution, reparation, compensation, reconciliation, atonement, redress, community service, mediation and indemnification" all "can be united under the umbrella of restorative justice." Kurki (2000: 263) has suggested that since the 1970s, restorative justice "has evolved . . . to a comprehensive approach toward crime." Other terms used to capture the same approach include "relational justice," "positive justice" and "reintegrative justice" (the last involving Braithwaite's concept of reintegrative shaming to which we refer below). We use the more common label of "restorative justice" (Van Ness and Strong 1997: 25; Marshall 1998) which is widely understood to represent a particular approach, albeit broadly defined and applied, to addressing wrongdoing or "crime."

Restorative justice treats crime as an interference or breach of a relationship, whether that is a relationship between individuals who know each other or a relationship which is implicit in living together in society (Price 1997; Lewellyn and Howse 1998). It replaces retribution, described as "revenge formalized by the state" (although "less emotional, more rational and more socially constructive than [private] revenge") (Law Commission of Canada 1999) with restoration of the relationship. The intent is to restore the moral balance disrupted when one person offends against another person or against property.

Restorative justice also challenges the adversarial model on which the criminal justice system is based and offers as a replacement "a consensus approach to justice" (Law Commission of Canada 1999). This is similar to the "alternative dispute resolution" or problem-solving consensus approaches in the civil context (British Columbia Ministry of the Attorney General 1998). In the criminal context, the current system focuses on a snapshot of the victim-offender relationship, that is on one particular act, while in reality the particular offence may be only the most immediate result of an on-going conflict which requires redressing (Law Commission of Canada 1999).

Although we have suggested it would not be appropriate to treat restorative justice in its current state as "transformative justice," it has been argued that there is "a strong connection between restorative justice and social justice;" although it can have harmful effects on social justice, it also may address some of the needs of the poor by, for example, at least reducing harms such as joblessness pursuant on imprisonment (Braithwaite 2000: 186, 191). Restorative justice may be best seen as part of a broader restorative project, as some commentators are beginning to question whether restorative justice can by itself transform justice, since justice cannot be viewed separately from society as a whole. Thus Mills and Schacter (2000: 1) propose using the term "restorative governance" to indicate that criminal justice cannot transform society or "restore the balance in society," but can at best play a "small role" in a process of governance of society in the larger sense (also see Van Ness and Strong 1997: 23). Braithwaite and Parker (1999: 105) argue that a "republican" restorative justice based on non-domination and equality principles must go beyond the individual offender and victim to deal with underlying causes of conflict in the community (such as racism as a cause of bullying in a school).

Thus restorative justice has been described as "'a revolution in criminal justice,'" (Umbreit and Coates 2000, citing Zehr 1997) and "a paradigm shift" (Umbreit and Coates 2000, citing Van Ness 1997), one which goes beyond how we think about crime and conflict to how we think about ourselves collectively as a society (Archibald 1999: 522). It is a "framework for thinking about and responding to conflict and crime, rather than a unified theory or philosophy of justice" (Law Commission of Canada 1999), relating to both process and outcome (Umbreit and Coates 2000), although it has also been described as "a philosophical approach to responding to crime" (British Columbia Ministry of the Attorney General 1998: 4) and "a comprehensive and coherent theory of justice" which must nevertheless be viewed as a "partial theory" in conjunction with other theories

(Roach 2000). Van Ness and Strong (1997: 5) suggest that restorative justice is a pattern of thinking which permits us to incorporate otherwise troublesome "data" about crime which the older pattern (which "channels us to see crime as law breaking, to focus our energies on the offender and to value punishment when it deters, rehabilitates, incapacitates or denounces") does not. Nevertheless, the term is also used loosely to apply to "alternative" approaches to the conventional criminal legal system and it is important to ensure that the particular – and peculiar – characteristics of restorative justice are identified (Llewellyn and Howse 1998). Distinguishing between the revolutionary and more limited objectives of or expectations about restorative justice requires an understanding of its principles and characteristics.

3.3.2 Principles and characteristics of restorative justice

The term "restorative justice" does not refer to a particular process, but a set of principles and may be defined as "a process whereby parties with a stake in a specific offence resolve collectively how to deal with the aftermath of the offence and its implications for the future" (Braithwaite 1999: 1743; also Joseph 1996; Marshall 1998; Nova Scotia Department of Justice 1998).

Lewellyn and Howse (1998)'s comparison of the "three main theories of justice [which] comprise most of the contemporary terrain: justice as restitution, corrective justice and retributive justice" is a good place to begin. While restitution may be an element of restorative justice, the two should not be seen as synonymous. Restitution may also be incorporated into the conventional system when the offender is required to return what he or she has taken or otherwise pay back the victim (Van Ness and Strong 1997: 92). Restitution and restorative justice both involve the victim, but the latter does so within the context of the relationship between the victim and the offender and the community. Furthermore, restitution generally fails to take account of the non-material harms suffered by the victim; yet these psychological or "spiritual" harms may actually be more important than the quantitative losses under restorative justice processes. In other words, restorative justice is not about paying reparations in the sense of compensation, but about "'righting wrongs'" in the broad sense or "healing wounds" (Law Commission of Canada 1999). Corrective justice does take account of the non-material harms, but does so by making a transfer from the wrongdoer to the victim; yet, as Llewellyn and Howse (1998) point out, making the offender worse off does not necessarily make the victim better off or remedy the injustice she or he has suffered.

Retributive justice, like restorative justice, aims to establish or reestablish what Llewellyn and Howse (1998) call "social equality between the wrongdoer and the sufferer of wrong," but it does so through punishment. Restorative justice, on the other hand, "problematizes the issue of what set of practices can or should, in a given context, achieve the goal of restoring social equality" and determines the answer through dialogue among the wrongdoer, the victim and the community. The participants are encouraged to recognize "the Other in her/his individuality," not merely in generic category of wrongdoer and victim (Hudson in Ashworth and Wasik, eds. 1998: 249). This recognition of "Other," we note, is at the core of transformative mediation in the civil context. Mediation provides an opportunity for the parties' moral growth and mutual recognition of each other's condition (Bush and Folger 1994: 81) Such recognition must include acknowledgement that the wrongdoer also experiences harm, argue Llewellyn and Howse (1998), requiring a commitment by the community not to stigmatize the wrongdoer.

According to Bazemore and Umbreit (1999: i), restorative justice "emphasizes one fundamental fact: crime damages people, communities, and relationships. If crime is about harm, a justice process should therefore emphasize repairing the harm." Furthermore, it involves "seeing crime problems in their *social context*" (Marshall 1998, emphasis in original). Restorative justice is relational rather than individual and contextual rather than abstract (Llewellyn and Howse 1998). The phrase "balanced and restorative justice," captures the idea that restorative justice constitutes a return to or development of harmony or equilibrium within the mainstream setting of parole: balance means "the restoring of victims and their respective communities at large, while at the same time maintaining a focus on the risks and needs of the offender" (Lewis and Howard 2000: 40). Llewellyn and Howse (1998) point out that "[w]hile the beginning point of restorative justice is a state of wrong that has disturbed the relationship between the wrongdoer and the sufferer of wrongdoing, its *endpoint* may be quite different than the *status quo ante*" (also see Kwochka 1996: 157).

Because restorative justice begins with the premise that crimes are not merely or even most importantly "transgressions against the state," but rather "the rupture of a relationship between two or more people," in contrast to the mainstream system, it places the offender and the victim, along with the community or communities of which they are a part, front and centre in the resolution of the problem represented by the criminal activity (Law Commission of Canada 1999). It takes a "holistic" approach to crime, one which recognizes the interrelationship between offender, victim and community and that the goals of each may attract at least some shared solutions. It involves the offender as an active participant in addressing the problem represented by his or her offence rather than as a passive recipient of sanctions imposed by the law. It sees the victim less as a witness on behalf of the state than as someone who may be witness to the restoration of her or his own situation and that of the offender in the community. The community becomes both actor and place of reintegration of both offender and victims (Van Ness and Strong 1997: 111-112). Indeed, "building community" has been described as "the true test" of restorative and community justice (Bazemore and Umbreit 1999). According to Braithwaite (1999a)

> Restorative justice means restorating victims, restoring offenders and restoring communities. These objectives take priority over punishment. Key *values* of restorative justice are healing rather than hurting, respectful dialogue, making amends, caring and participatory community, taking responsibility, remorse, apology and forgiveness. Restorative justice is also a *process* that involves bringing together all the stakeholders – victims, offenders and their friends and loved ones, representatives of the state and the community – to decide what should be done about a criminal offence. (Emphasis in original)

The language used in each system is revealing: rather than "proportionality, certainty and severity," the words of the mainstream criminal legal system, restorative justice employs terms such as "[h]ealing, contrition, forgiveness, growth and development" (Llewellyn and Howse 1998), as well as "reconciliation, negotiation, vindication and transformation" (Van Ness and Strong 1997: 181).

Llewellyn and Howse (1998) identify the main elements of restorative justice as voluntariness and truth-telling (reflected in an "imperative of personal narrative"), a process which requires the perpetrator to admit wrongdoing and through which all the participants seek an "intersubjective truth." The notion of "encounter" has been called "one of the pillars of a restorative justice approach to crime" (Van Ness and Strong 1997: 68, 77-78). In the mainstream system, rules of evidence and the involvement of lawyers, the absence of primary and secondary victims and the accused's lack of understanding about how the system works, militate against an encounter between the offender and the victim (Van Ness and Strong 1997: 68). Although Llewellyn and Howse (1998) emphasize that the encounter must be face-to-face "confrontation and challenge," the importance of this requirement is somewhat diminished by their acknowledgement that if one party does not want to participate or both parties do not want to meet face to face, a communicator may be used as a go-between. Another alternative is "victim-offender panels" which bring together groups of unrelated victims and offenders with the intent of informing the offenders about the impact of their wrongdoing (Van Ness and Strong 1997: 74). In Minneapolis, panels of neighbourhood residents meet with offenders charged with soliciting prostitutes and develop a sentence (Lerman 1999: 20).

Messmer and Otto (1992: 2) explain that under restorative justice, "[r]eparation should encourage the integration of *victims* into legal proceedings as individuals with justified claims;" the victim's right to reparation supercedes punishment of the offender by the state. The emphasis for offenders is accountability. The procedures by which the offender and victim reach agreement about reparations must be fair, characterized by "voluntariness, equality of treatment, as well as the chance to disagree". The community is to be involved in helping to integrate the offender into society. (emphasis in original)

Restorative justice contemplates the reintegration not only of the offender, but also the victim, into society, since often the victim feels stigmatised by the crime. For reintegration to be successful, the victim or offender and the community must respect each other, must commit to each other and must have "intolerance for – but understanding of – deviant behavior" (Van Ness and Strong 1997: 120).

Some commentators maintain that restorative justice processes provide an opportunity for forgiveness of the offender by the victim. Enright and Kittle (2000: 1630) view forgiveness as "a merciful act of giving a gift to someone who does not necessarily deserve it;" it is not a substitute for justice, since regardless of whether the victim has forgiven the offender, "the offender still has a debt to pay, whether to the victim, to the state, or both." Worthington (2000: 1731) suggests that although forgiveness occurs within the victim and cannot be achieved by the justice system, "[f]orgiveness is more likely with restorative justice than traditional justice." Even so, this is a "grudging forgiveness, which satisfies the grudge by helping the victim feel free of hate and righteously magnanimous for granting mercy" (Worthington: 1730). On the other hand, Lerman (2000: 1674) maintains that restorative justice principles "provide a theoretical and programmatic background for forgiveness to become a part of the lexicon of the United States criminal justice system. Proponents of forgiveness affirm that it does not necessarily mean either condonation (Enright and Kittle 2000: 1623) or forgetting, but rather viewing the offender as part of the human community and "committing to deal with him [sic] again" (Meyer 2000: 1523, 1524).

More prosaically, the British Columbia Restorative Justice Framework identified seven principles which could equally characterize less purportedly "new" initiatives: awareness and involvement of the public; accessibility at every stage of the justice process; inclusiveness; public safety; procedural fairness and equitable settlements and agreements; redressing of significant power imbalances; and cost effectiveness (British Columbia Ministry of the Attorney General 1998: 7).

3.3.3 Relationship with the mainstream system

There is some debate about the extent to which restorative justice should – or can – co-exist with the mainstream system. Llewellyn and Howse (1998) go so far as to argue that restorative justice should replace the current system. Most such proponents of a single system concede the necessity, albeit not the desirability, of a dual system during a transition to a full restorative justice model, even while acknowledging that in a restorative system it may be necessary to deprive some offenders of their liberty for the protection of the public in narrowly defined cases (Wright 1992: 52).

Most commentators recognize or concede that restorative justice will not always be appropriate or effective and that it must be "backed up" by more traditional approaches, such as punishment, including imprisonment or, more generally, "incapacitation" (Wright 1992: 530; Kwochka 1996: 167; Braithwaite 1999: 1742). Braithwaite's examples of incapacitation other than imprisonment include removal of licenses for medical frauds and the removal of children from child abusers. The approach to wrong-doing, he suggests, should not be either/or but one in which "the weaknesses revealed in the failure of one strategy [will be countered] with the strengths of another" (Braithwaite 1999b: 1742). Others have agued that the government should be "responsible for maintaining a basic framework of order, and the other parties [should be] responsible for restoring community peace and harmony" (Van Ness and Strong 1997: 31). Realistically, restorative justice "as a partial theory of justice must be reconciled with retributive theories of justice;" for example, what constitutes harm will be determined not only by the victim, but also by the *Criminal Code* and "the charging decisions of police and prosecutors" (Roach 2000).

Even where there is agreement on a dual system, there remain contentious issues. Marshall (1998) contends that victims should always have a chance to engage in victim-offender mediation and the offender the opportunity to make reparations, although now the main factors determining whether this option is presented are those of greatest significance to the legal system by diverting the offender from prosecution (or trial) or imprisonment and reducing costs. Rudin (1999) argues that restorative justice should not always involve representatives from the formal legal system, since that transfers the coercive nature of the legal system to the restorative justice system; others argue, however, that "state officials should be involved if restorative justice is to reach those affected by state processing" (Roach 2000; also see Braithwaite and Parker 1999: 109). Nevertheless, the timing of events in restorative justice – or of the introduction of restorative justice practices into the situation - should not be dependent on timing in the formal legal system; for example, a victim might not be ready to meet an offender prior to sentencing when often that is when the restorative initiative is to take place.

Young (1999: 266) argues that "restorative community justice" brings offenders in a local community "to account" so that they are both punished and required to settle accounts with the victims and community" with both punitive and rehabilitative "judicial interventions" implemented quickly. Thus in this light, restorative justice is an aid to the mainstream system and both work together to respond to the challenges posed by the "law-and-order" and "holistic" critics of the mainstream system.

In Canada formal restorative justice initiatives fall within the "alternative measures" permitted by section 717 of the *Criminal Code* and section 4 of the *Young Offenders Act*: they require the sanction of the mainstream system. Thus the British Columbia "restorative justice framework" was intended to "enhance" the existing system, not replace it (British Columbia Ministry of the Attorney General 1998: 2) and the same is true of the Nova Scotia comprehensive restorative justice program which was actually an extension of the alternate measures process in place for juvenile offenders (Nova Scotia Department of Justice 1998; Archibald 1999: 523). Perhaps more significantly, there may be a temptation to bring even more flexible restorative justice processes which began outside the mainstream system within the control of the dominant system. For example, some observers, including appellate courts, believe that guidelines should be established for circle sentencing (Manson 1999: 489), perhaps the ultimate irony since traditional aboriginal practices are considered by many to be the foreparent of "modern" restorative justice practices.

3.3.4 Relationship between criminal and civil justice

One signal of a "paradigm shift" is the eliminating of the boundaries between the civil and criminal legal systems. Llewellyn and Howse (1998) contend that while the emphasis on restorative justice has been in the criminal area, this development is the result of "the arbitrary historical distinction between public and private law" which "was grounded on morally arbitrary choices about which actions could threaten the rulers' social position or control." The issue is not, therefore, whether the legal regime is criminal or private, but whether a wrong has been committed, although it may be a matter of debate about whether particular conduct should be framed as a "wrong." They refer to labour law, family law (where there are power imbalances and emotions), international law and corporate regulation (white collar crime) as civil areas where restorative justice has a part to play. The British Columbia justice reforms were directed at both the civil and criminal systems, although typically employing different language ("collaborative, consensus-building approaches" and "restorative approaches," respectively) (British Columbia Ministry of the Attorney General 1998: 1). The perception of crime as a breach of the relationship between the victim and the offender, rather than as an offence against the state, reflects the basis of civil harm as arising from wrongdoing by one individual against another. The increased involvement of the victim in criminal cases diminishes the control by the Crown. Yet while the boundaries between civil and criminal disputes may be blurring, they are far from dissolved and even proponents of criminal restitution acknowledge the different purposes satisfied by the civil and criminal systems (Thorvaldson 1990: 35).

3.3.5 Responding to needs

One of the major claims and appeals of restorative justice relate to the way in which it takes the needs of all participants into account and how an emphasis on their needs determines process and outcome. Most, although not all, programs acknowledge the needs of the generic offender, victim and community (for example, all victims "need to regain control over their own lives, and [have] need for vindication of their rights" [Van Ness and Strong 1997: 32]); the major exception is aboriginal programs which are directed at the particular circumstances of aboriginal offenders and communities.

Restorative justice redefines the offenders' "needs" from a fair trial and just punishment to the need to take responsibility and to replace punishment, specifically imprisonment, with consequences which can lead to growth and change in a positive direction. The Balanced and Restorative Justice Project (BARJ) in the United States, a national program directed at juveniles, begun in 1993 and funded by the United States Department of Justice illustrates the response to offenders' needs (Bazemore and Umbreit 1999; Lewis and Howard 2000). Offenders' accountability is viewed as taking responsibility for their offences and the harm they caused victims rather than "taking [their] punishment," with victims and community taking 'active roles in the sanctioning process;" competency is achieved when offenders develop their strengths and relationships with law-abiding adults in order to become more productive members of their communities; without eliminating "locked facilities," public safety is achieved through the development of new relationships and structuring time around work, education and service. The approach reflected in BARJ may be applied through a variety of specific measures, including victim-offender mediation or reconciliation, sentencing circles, community reparative boards and conferencing.

For victims, the most significant impact of restorative justice is the larger role it envisions for the victim, sometimes one that is central to the process or one which contemplates a different "structural position" for the victim in the criminal legal system (Law Commission of Canada 1999). One probation service in the U.K. contends that "work with victims can no longer be seen as an adjunct to work with offenders; it assumes a standing in its own right in relation to the development of a broader contribution by the Probation Service to the criminal justice process" (quoted in HM Inspectorate of Probation 2000[48]). Llewellyn and Howse (1998) distinguish between processes which are "victim-controlled" and those which are "victim-centred;" the latter reflect restorative justice, while the former do not since the victim cannot ask for something antithetical to the restoration of the relationship.

The goal of including victims as a major player in the process is to "empower" the victim (Bonta *et al* 1998; Llewellyn and Howse 1998). The minimum requirement is to be sure that the victim "is not more abused or overwhelmed by the process" (Bazemore and Umbreit 1999) and that practices are instituted to inform and safeguard the victim (Marshall 1998). Therefore, the victim must consent to involvement in a particular process, although there is a concern with the pressure a victim might feel faced with claims about the value of restorative justice and its importance to the community (Law Commission of Canada 1999; Llewellyn and Howse 1998). Once involved in a process, a victim may feel pressured to reach agreement with the offender since the offender may otherwise go to jail (Law Commission of Canada 1999).

The most extensive role for victims occurs in victim-offender mediation, one form of which goes back to the introduction in Ontario of a Mennonite Church sponsored victim reconciliation program in the 1970s (Bonta *et al* 1998) where often the victim speaks directly with the offender and has a say in the determination of the "reparative plan" and in circle sentencing where the victim not only participate equally in the circle process but may be involved in a healing conference (Bazemore and Umbreit 1999). These models encourage the victim to express her or his feelings about the crime, although some emphasise restitution and others reconciliation (Bonta *et al* 1998).

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[48] This study treats these victim services as an example of restorative justice.

According to Bazemore and Umbreit (1999), family group conferencing may be least responsive to the victim's needs, although more recent experiences indicate greater attention to the victim, and circle sentencing, because it is an open process, risks greater attention being given to the offender and his or her rehabilitative and support needs than to the victim and her or his reparative needs; one way in which the balance may be redressed is through a victim support group organized by the convenors of the circle.

Restorative justice envisions that the community will also become "empowered" to deliver relevant programs; this means that it will not be government's responsibility to do so, as it is now (Nova Scotia Department of Justice 1998). The Youth Circles program in Saskatchewan, begun in the fall of 1997, is an example of a community-based program developed between the government and the Saskatoon Tribal Council (Boyer 1999). Aboriginal youth had tended to be excluded from the established young offender mediation programs because they were not considered suitable for diversion in light of the high number of contacts they had had with the police by the time they had turned twelve. The program uses a medicine wheel approach, completing in each case a "home study" in order to discover "which aspect of the medicine wheel was out of balance." As Kwochka (1996: 159) explains, the medicine wheel "teaches that everything is interrelated and evolves in a circular pattern;" the physical, mental, emotional and spiritual elements in an individual must be equally developed to be balanced. Where there is an imbalance in the individual or the community, it needs to be restored through healing, taking into account a broader time period and circle of people than does the retributive system.

3.4 Restorative Justice Initiatives

3.4.1 Introduction

Governments in a number of countries have adopted restorative justice as an approach to criminal justice, including England, Scotland, New Zealand, Norway, the United States and European countries (Warner 1992; Wright 1992:531; Marshall 1998; Bonta *et al* 1998; Omatsu 1999;

Bazemore and Umbreit 1999; Kurki 2000). It is perhaps not surprising that restorative justice is a significant model in Japan, since "[a]pology and reciprocal pardon are dominant threads of Japan's cultural fabric" and restitution and mediation are "normal" or regular activities (Haley 1992: 114). In Canberra, the capital of Australia, "more than 10,000 citizens out of a population of 300,000 have attended a conference" (Braithwaite1999: 1745).[49] The United States Department of Justice has embraced victim-offender mediation and there are more than 1000 victim-offender mediation programs (VOMs) dealing with thousands of cases a year, although many are private, community-based programs; there are more than 25 programs in Canada and over 700 programs in Europe (Bazemore and Umbreit 1999; Bonta *et al* 1998; Umbreit 1999: 213). In the U.K. victim-offender mediation and reparation schemes exist in connection with some probation services; there are also community mediations directed at crime prevention which deal with cases where the offender and the victim are both victim and contributor to the problem (HM Inspectorate of Probation 2000). The Community Law Reform Commission for the Australian Capital Territory recommended that its proposed Process of Attempted Reconciliation program "be accorded statutory recognition and protection," following a pilot project, based on the legislative support given programs in New South Wales and Queensland (Community Law Reform Commission 1993).

Governments may embark on restorative justice processes for many reasons. The Nova Scotia restorative justice project, for example, had as its primary goals, reducing recidivism and increasing victim satisfaction and as secondary goals, strengthening communities and increasing public confidence in the justice system (Nova Scotia Department of Justice 1998). As previously indicated, restorative justice initiatives in Canada need the legitimacy offered by section 717 of the *Criminal Code* and section 4 of the *Young Offenders Act* and the Canadian government initiatives in Canada do conform to the legislative requirements.

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[49] A conference is a term used to describe a meeting of victim, offender and often members of the community with

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the assistance of a mediator or facilitator. For discussion of conferences, see *infra*.

The most comprehensive schemes permit restorative justice at any point during the criminal legal process; however, they usually remain linked with the process in the event restorative processes fail. For example, the Nova Scotia initiative contemplates entry points at various stages of the criminal legal process, with more serious cases (particularly domestic violence cases) being diverted at later and more public stages (Nova Scotia Department of Justice 1998); this multiple entry "may be unique" and, it is claimed, differentiates the Nova Scotia scheme from "an adjunct to sentencing" or more limited or piece-meal alternative measures (Archibald 1999: 524). The Nova Scotia program builds on existing alternative systems, such as the adult and juvenile diversion systems, which Archibald suggests are not in themselves restorative because they do not include the victim and the community "on a consistent basis."

The minimum requirements of the Nova Scotia project (reflecting those required by section 717 of the *Criminal Code* and section 4 of the *Young Offenders Act*) are that the referral is not inconsistent with public safety; it is appropriate in light of the interests of victim, offender and community; the offender accepts responsibility for his or her actions; the offender is given information about the program and consents "freely and fully" to participation and may retain counsel; there is sufficient evidence to proceed and prosecution of the offence is not barred by law. The discretionary factors which, according to Archibald (1999: 528) "are similar to those found in Crown Attorney guidelines concerning the decision to terminate proceedings in the public interest or those found in various alternative measures schemes presently in use across the country, though with a heavy emphasis on victim concerns" are: the degree of the offender's cooperation; the extent of the victim's willingness to participate; whether the community desires a restorative result; the offender's motive for committing the offence; the seriousness of the offence and the planning engaged in by the offender; the relationship between victim and offender and possibility of a continued relationship; the offender's capacity to learn from the process and follow through with any agreement; the potential for a meaningful agreement for the victim; the harm suffered by the victim; previous referrals of the offender to similar programs; conflict with a government or prosecution policy; and other relevant factors about the offence, offender, victim and community. If the offender or community agency believes that the forum should not continue, the offender may be returned to the conventional process, there will be monitoring of the agreement by the community agency and statements by the offender will not be admissible in evidence against the offender.

According to Braithwaite (1999: 1744), "participant (victim, offender, community, police) satisfaction with such restorative justice processes [as conferencing] is extremely high, typically 90%-95%, and in some studies even higher." He suggests (at 1745) that anticipated sources of opposition (the police, victims and in particular women with respect to crimes of violence against women) have either been supportive or have converted after experience with conferencing.
Before considering the main restorative justices responses in greater detail, we identify some "piecemeal" responses to problems with the criminal legal system which (apart from legal aid) have been labeled as "restorative."

3.4.2 "Piecemeal" Responses

3.4.2.1 Introduction

"Piecemeal" or individual responses include legal aid, conditional sentences, lay tribunals, initiatives designed to recognize victims and initiatives to provide information to and liaison with accused. In our view, all these initiatives are intended to make the mainstream system "work better," and/or more equitably, but they are not intended to change it fundamentally. As we indicated in Chapter 1.0, these are first and second wave reforms, to use Cappelletti and Garth's nomenclature (1978b, 1979). It should be noted, however, that most of these initiatives may be considered "restorative justice" initiatives by some observers (Bazemore and Walgrave 1999: 48; Young 1999). Thus Marshall (1998) considers support groups for victims and for offenders as examples of restorative justice practices. Although describing discrete approaches such as victim impact statements as "marginal," he maintains that "[r]estorative justice is not simply a matter of new self-contained programmes. It involves principles that can inform every aspect of the work of all criminal justice agencies. One can have restorative prisons, restorative policing, etc." Similarly, the Supreme Court of Canada has acknowledged that Canadian sentencing provisions now incorporate restorative principles (*Gladue* 1999;[50] Roach and Rudin 2000; Llewellyn and Howse 1998).

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[50] *R.* v. *Gladue*, [1999] 1 S.C.R. 688

3.4.2.2 Legal aid

Although it is not a restorative justice initiative, we begin with legal aid since it has been for many years the major way in which offenders have been given "access to justice." Formal legal aid programs have been part of the criminal legal system since the 1950s. The primary objective of criminal legal aid (including state-funded legal representation provided outside the legal aid plan) has been to provide to an indigent accused the legal representation necessary for a fair trial, ideally similar to that which a paying client would receive (for the most part, this means a legal aid client would not receive a higher level of representation than a paying client) (*Rowbotham* 1988;[51] *Winters* 1999[52]). The same principle underlies civil legal aid, although it may not as easily available (Mossman 1993; Hughes 2000 ; *G.(J.)* 1999[53]). Criticisms of the legal aid system relate both to the amount of legal aid allowed and the kinds of cases for which legal aid will be granted (Mossman 1993; McCamus 1997; Zemans *et al* 1997). While there have been calls for a broader or more holistic approach to legal aid (Ewart 1997), these proposals generally remain within the parameters of the adversarial criminal legal system. Indeed, as we indicated in Chapter 1.0, some commentators maintain that legal aid may even "perpetuat[e] social injustice" (Young and Wall, eds. 1996: 25). Given the differential access to the criminal and civil legal systems in their current form, legal aid is a necessary tool of access, but in itself it is not – and is unlikely to become – a means by which we can redefine the meaning or reality of the phrase "access to justice." This is not to say, however, that the way in which legal aid is allocated could not take into account equitable access to processes or initiatives arising out of new ways of defining justice (Currie 2000); on the contrary, we believe that it could and should do so.

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[51] *R.* v. *Rowbotham* (1988), 41 C.C.C.(3d) 1.

[52] *Winters* v. *Legal Services Society and the Attorney General of British Columbia*, [1999] 3 S.C.R. 160.

[53] *New Brunswick (Minister of Health and Community Services)* v. *G.(J.)*, [1999] 3 S.C.R. 46.

3.4.2.3 Victim-centred initiatives

In recent years, the mainstream system has incorporated a greater role for the victim (other than as a witness), but participation is still not extensive (Van Ness 1993; Law Commission of Canada 1999).

In Canada, section 722 of the *Criminal Code* provides that victims or their families may deliver victim impact statements on sentencing or when discharge or conditional discharge is a possibility, for example. In one sense, the impact on the victim has long been taken into account by a sentencing judge; victim impact statements are a more formal element in sentencing, however, and bring the victim's own words into the process. Relying heavily on the Canadian experience to 1990, the Community Law Reform Commission of the Australian Capital Territory's Report on victim impact statements found that the use of these statements had not led to too great a victim influence in sentencing or to complicating the sentencing process, but had allowed victims to feel involved in the process, even if the statement was not actually used in court (Community Law Reform Commission 1993). On the other hand, victims groups have argued that the use and understanding of victim impact statements is erratic and may be censored to the extent that the victim hardly recognizes them ("Victims' Groups" 1999). The Australian Report pointed out that victim impact statements were for the benefit of the victim and the court and do not "mean that the offender will gain an appreciation of the hurt he or she has caused a person" (Community Law Reform Commission 1993); such an appreciation is a mark of restorative justice.

Another discrete victim-focused process has been criminal injuries compensation which revived the old custom of offenders' paying reparations to victims in Anglo-Saxon society, gradually displaced by payments to the Crown or lord for the loss to them (Community Law Reform Commission 1993). Criminal injuries compensation was introduced in New Zealand in 1963 and now exists in a number of jurisdictions, including Canada where it is the responsibility of the provinces. On the one hand, the justification for criminal injuries compensation has been said to be consideration for the victim's having left the crime to be dealt with by the state; on the other hand, it has been said to be a recognition by the community of the unjust infliction of harm (Community Law Reform Commission 1993; Llewellyn and Howse 1998). But the process can be counterproductive if it is highly technical, formal or adversarial; or if the state is able to claim any monies paid to the victim from the offender, since the offender might then be entitled to cross-examine the victim (Community Law Reform Commission 1993).

In the U.K., a "Victim's Charter" was established in 1990 (and updated in 1996) which required the probation service to contact victims to see whether they had concerns about the conditions of release of offenders who had been sentenced to life and subsequently to the release of other offenders. A subsequent study showed that it had mixed but generally positive results, concluding that the restorative work that was accomplished was impressive and "[n]ew developments with victims of domestic violence added a depth to work with offenders, whilst protecting women from re-victiminization" (HM Inspectorate of Probation 2000).

It should be noted that many victim-centred initiatives have resulted from lobbying by the "victims' rights movement." Thus Kurki (2000: 266, 264) argues that restorative justice, which focuses on victims *and* offenders, is not "part of" the victims' rights movement, even though it is "typically associated with it and other social movements." Joseph (1996: 218), in contrast, suggests "the growth of the victims' rights movement should have a positive effect on the growth of victim-offender mediation programs."

3.4.2.4 Offender-directed initiatives

No measure is actually offender "centred," since at least the community must always be considered. Therefore, we use the term "offender-directed." Lay tribunals and legal aid, which we have already discussed, are both offender-directed initiatives. Other initiatives directed at the offender's ability to interact with the mainstream system include court workers, programs which are sometimes designed specifically to recognize accused's specific characteristics, such as the Native Court Worker

Program in Saskatchewan, and which provide information about the system and may act as a liaison as the accused proceeds through the system (Currie, 2000).

One of the main offender-directed initiatives is conditional sentencing. Criticisms of the heavy-handed resort in Canada to imprisonment as a form of punishment led to the sentencing reforms in Bill C-41 enacted in 1995. Sections 718, 718.1 and 718.2 set out the purpose, objectives and principles governing sentencing. The Supreme Court of Canada has said that section 718, in referring to sentencing objectives providing reparations to victims or the community, promoting in offenders a sense of responsibility and acknowledgement of harm done to victims and community, and in assisting rehabilitation of offenders, has identified "restorative goals" as a "focus" of sentencing; furthermore, "[r]estorative sentencing goals do not usually correlate with the use of prison as a sanction" (*Gladue* 1999: para. 43). The application of restorative justice principles is intended "to reduce the rate of incarceration and improve the effectiveness of sentencing" (*Proulx* 2000: para.20[54]). Section 742.1 of the *Criminal Code* provides for conditional sentences where the judge would have sentenced the offender to a term of imprisonment of less than two years,[55] the public's safety would not be endangered and a conditional sentence would be consistent with the sentencing principles set out in section 718 of the *Code*. The sentencing judge must impose certain "compulsory" conditions, may also impose other specified conditions and has some discretion to impose others which can be tailored to the offender with the goal of preventing recidivism; this differs from conditions attached to probation under section 732.1 of the *Criminal Code*, the purposes of which are to protect society and to facilitate the offender's reintegration into society (Roberts and LaPrairie 2000). At least some of these conditions are meant to be "punitive" and conditions "restrictive of the offender's liberty should be the norm, not the exception" (*Proulx* 2000: para. 36).

Although the requirement that the judge would have sentenced the offender to prison is intended to avoid "net-widening" or actually increasing the number of persons incarcerated, there is still concern that conditional sentences may increase the number of people incarcerated (Roberts and LaPrairie

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[54] *R.* v. *Proulx*, [2000] 1 S.C.R. 61.

[55] Conditional sentences are not allowed where an offence is punishable by a minimum term of imprisonment.

2000; Roach and Rudin 2000). Conditional sentences may be longer than prison sentences and offenders who breach a condition may be imprisoned for the longer period (Roach 2000; *Proulx* 2000: para. 39). Conditional sentences must be realistic and relevant to the offence; otherwise there is an increased risk of the offender's committing a minor offence (such as breaking curfew) which will result in imprisonment (Quigley 1999), a not insignificant concern given that aboriginal offenders have been "disproportionately subject to system based offences" which include breach of a condition imposed as part of a conditional sentence (Roach and Rudin 2000, citing LaPrairie 1998 for evidence that this is occurring). At the same time, Roberts and LaPrairie (2000) warn that conditions must be "properly crafted" if conditional sentences are not to appear too lenient to a population which already believes sentences are not severe enough.

3.4.2.5 Community-centred initiatives

One way of involving the community in the criminal legal system is to "decentralize" mainstream institutions, actors or processes. Turner (1999) argues that "the community can deliver a more effective form of justice in many cases than can the centralized criminal justice system. [This approach] also reflects local expertise and recognizes that the public should be involved in developing and delivering justice services."

In Canada piece-meal community-based or partnered initiatives include the provision of public education, measures directed at crime prevention, community policing, support for and supervision of offenders released into the community and victim support services (Turner 1999; Currie 2000). In the United States, for example, there has been a concerted effort "to bring courts, prosecution units and defence teams to local neighborhoods" (Bazemore and Gordon 1999; also see Harris 1998; Young 1999; Kaas 2000). While "restorative justice" and "community justice" may be treated as very similar, if not the same, particularly when contrasted with more traditional approaches (Harris 1999: 83), in fact community justice processes are more likely to be directed at crime prevention and citizen participation often takes the form of assisting agents of the system, such as police, rather than challenging them (Kurki 2000: 244). It must be recognized, furthermore, that "neither developing programs and increasing access will alone change the role of neighborhood residents from service recipients to decision makers with a stake in, or feeling of ownership, in what services are provided and how they are delivered [sic];" rather, it is necessary to identify "distinctive roles for citizens in determining what the obligation and terms of accountability will be, as well as how these reparative requirements may be carried out as part of a dispositional or diversion sanction" (Bazemore and Gordon 1999).

Lay tribunals, operating in the United States and Canada, also involve the community in the criminal system (Kurki 2000: 282-283). For example, reparative boards are composed of local citizens who, after hearing from the young offender (who has been referred by the courts), others (such as parents or friends) and sometimes the victims, determine the appropriate outcome and process of enforcement which they may monitor. Even among those who consider these tribunals to be a form of restorative justice, they are acknowledged to be the most formal and least consensual of the approaches (Bazemore and Umbreit 1999). A similar system involving a lay tribunal of community representatives, the offender and the offender's parents, but not the victim, has been in place for thirty years in Scotland (Marshall 1998, citing McAra and Young 1997).

The kinds of initiatives discussed above, if successful, may help the victim overcome some of the destructive effects of the crime she or he suffered. They may give "the community" some sense that the legal system is not always distant or abstract. They may even make the criminal legal system slightly more accessible or equitable for the offender. But they do not require "the paradigm shift" to which this paper is addressed. For that, a change in the conceptual framework is required. It is to responses which purport to offer such a substantive change to which we now turn.

3.4.3 The three main restorative justice approaches

3.4.3.1 Introduction

In this section we discuss the most common measures designed to advance restorative justice: victim-offender mediation, (family) group conferencing and aboriginal circles and other aboriginal initiatives. Our discussion is not meant to be exhaustive, but to indicate the way in which these processes are said to respond to criticisms of the mainstream system and to meet the needs of victims, offenders and communities or, in short, to indicate how these approaches are said to reflect principles of restorative justice. Although it is possible to identify "pure" or discrete models, they have begun to influence each other (Bazemore and Umbreit 1999). While some observers believe that a "hybrid" model may be developed, Bazemore and Umbreit (1999) conclude that it is more realistic to envision the use of a variety of models, depending on the specific needs of the case and the need to maximize efficiency in use of resources. Factors which could be taken into account in determining the appropriate model include the seriousness of the crime, the nature of the harm suffered by the victim, the record of the offender and the existence of other "complications" such as dysfunctional relationships (Peachey 1992; Marshall 1998; Bazemore and Umbreit 1999). As Peachey (1992: 553) indicates, "the various approaches to restorative justice have different foci. Restitution and compensation focus on the victim. Retribution focused on the offender. Forgiveness often implies altering the relationship between the victim and the offender." Yet for those involved, the distinctions may not be as clear. An offender may perceive as punishment that which the victim or "authorities" consider restitution.

One final introductory comment: while these approaches are all said to reflect restorative justices principles, they differ with respect to who is involved (the community is less likely to be involved in victim offender mediation than in conferencing, for example) and whose interests are most significant (the offender's interests may be emphasized more in conferencing than in victim offender mediation); furthermore, it is important to recognize and respect the different processes which these approaches follow (for example, in the sentencing circles, each person speaks in turn to all the participants and there is to be no interruption of people as they speak, while in victim-offender mediation, the mediator may encourage the offender and victim to speak to each other; either of these might be usefully contrasted with the reparation board (to which we have previously referred) where the offender, victim and others who participate address the board members).

3.4.3.2 Victim-offender mediation

Victim-offender mediation (VOM) may be the most widespread restorative justice practice, although Price (1996) argues that it is "not inherently restorative," since it may have punitive goals and others have argued that "restorative justice is more than mediation" (Walgrave 1999: 132). Other terms for this process include "victim offender dialogue, meeting or conference" in order to distinguish it from civil mediation (Bazemore and Umbreit, 1999; Office for Victims of Crime 2000). The Community Law Reform Commission of the Australian Capital Territory (1993) suggested that an appropriate term is "Process of Attempted Reconciliation," since it more accurately reflects process rather than outcome (also see Van Ness and Strong 1997: 70).

Although VOM may be considered a descendent of victim-offender reconciliation programs (VORPs) developed in the 1970s in Canada, it is now a distinct branch in order to emphasize a heightened attention to the victim (Office for Victims of Crime 2000). The difference in terminology is important. When the American Bar Association was considering whether to endorse these programs, the victim caucus objected to endorsing VORP because "reconciliation" carries a connotation of forgiveness and ignores victims' anger; the ABA subsequently endorsed victim-offender mediation because "it emphasized the process rather than the expected outcome of mediation" (Office for Victims of Crime 2000), a feature generally characteristic of restorative justice (Llewellyn and Howse 1998), although others argue that process and outcome are equally important (Bazemore and Walgrave 1999: 48; Kurki 2000 264). The term actually approved by the ABA was "victim-offender mediation and dialogue" in order to make it clear that neither losses nor guilt was negotiable (Office for Victims of Crime 2000).

The most commonly recognized benefits of VOM include a more comprehensive approach to victims' needs; the opportunity for the victim and offender to see each other as persons; and the possibility that it will have greater impact on the offender than the usual sanctions. Where the community is involved, VOM delivers a message of the community's willingness to re-accept the offender (Marshall 1998). In practice, programs may differ with respect to the particular community of offenders whom they serve, the extent to which they involve the community, the type of crime they address or their affiliation or funding (Joseph 1996), but there are some common elements and goals: the programs are meant to be more concerned with changing the parties than restitution of any actual loss (Community Law Reform Commission 1993). We note that when the American Bar Association endorsed VOM in 1994 as a practice which should be available in all courts in the United States, it set out thirteen requirements with which the programs should comply (American Bar Association Endorsement 1994; Office for Victims of Crime 2000).

The dynamics of victim-offender mediation have been described as different from those characterizing civil mediation. Unlike much of civil mediation, mediation in the criminal context does not involve "disputants" and the mediation is not for the purpose of determining fault, since the offender has admitted wrongdoing. Thus the mediator's participation is based on recognition of one person's wrongdoing at the outset; "[t]he mediator is neutral as to the individuals, respecting both as valuable human beings and favoring neither . . . But the mediator is not neutral as to the wrong" (Price1997). It is important that the mediation not divert attention from the offender's conduct and obligation to make amends by considering whatever role the victim might have had in the crime; these complexities can be addressed only when "the current offence has been atoned for, when the bargaining table is once again level" (Marshall, 1998; Office for Victims of Crime 2000). Victim-offender mediation also has been described as "dialogue-driven," compared to "most other forms of mediation in civil court settings [which are] settlement-driven with little or no time to talk about the larger context of the conflict or the feelings of the involved parties" (Bazemore and Umbreit 1999; Office for Victims of Crime 2000).[56] Thus Umbreit (1997) advocates "humanistic mediation" as a healing process rather than an emphasis on reaching agreements, contrasting it to classic problem-centred mediation; his comparison between the two treats the latter narrowly and does not recognize that civil mediation generally may have some of the characteristics he ascribes to "humanistic-transformative mediation" or indeed, have some of the same objectives (Bush and Folger 1994).

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[56] To the extent that civil mediation is a step in the litigation process, this is not an inaccurate statement; it would not be an accurate statement with respect to much voluntary civil mediation, however.

VOM may occur at various stages of the criminal legal process, including as a diversion from prosecution (deferred prosecution) which is conditional on the agreement's being completed or after an admission of guilt in which case it is a condition of probation (Marshall, 1998; Office for Victims of Crime 2000). Although most often involving juveniles, it may also apply to adult offenders; a Office for Victims of Crime 2000 of about 250 established VOM programs in the United States showed that 45% of the programs worked exclusively with juvenile offenders and 9% exclusively with adult offenders, but that 46% worked with both (Office for Victims of Crime 2000).[57] Referrals may come from judges, probation officers, victim advocates, prosecutors, defense attorneys and police (Office for Victims of Crime 2000).

While victim-offender mediation may be employed for any crimes, they are more often used for "petty" or minor property crimes or minor assaults and less frequently for serious crimes against the person, including assault with a deadly weapon, assault resulting in bodily harm, sexual assault, domestic violence, negligent homicide, attempted murder and murder (Office for Victims of Crime 2000). Marshall (1998) asserts that mediation may be as successful with serious crimes, people with a record of crime and adults as with minor crimes, first time offenders and juveniles and that personal considerations such as motivation and attitudes of victim and offender are more important (also see Community Law Reform Commission 1993). Rudin (1999) argues that restorative justice should not be restricted to minor offences because "this is clearly a waste of a very valuable resource" (also Marshall 1998; Kurki 2000: 290). Price (March/April 1997) reports on his mediation of "severely violent crimes" which may take place only after months or even years of preparation. Peachey (1992: 556) maintains that reconciliation is most necessary where the desire for retribution is greatest (usually when the victim has been assaulted or sexually assault or otherwise personally wronged): "there is little need for reconciliation where the loss is trivial or can be addressed by third-party compensation through insurance or the state, but there is a tremendous opportunity for reconciliation where pain runs deep." Umbreit (1999: 223) indicates that VOM is beginning to take account of the need to adapt "to serve the more intense needs of parties involved in serious and violent criminal conflict."

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[57] The study identified 289 programs, but 35 of them were too new to provide data; not all the programs answered all questions. For example, 103 programs answered responded to a question asking with whom they worked.

To be successful, victim-offender mediation requires considerable effort. Both the offender and victim must give their consent to the process and must understand the nature of the process if it is to be effective. It often involves a session or sessions prior to the actual mediation in order to prepare both of the major players; these preparatory sessions, which occur prior to the obtaining of consent from the offender and victim to the mediation process, may be more important than the actual mediation in the effectiveness of the process (Bazemore and Umbreit 1999). Similarly, enforcement of reparation agreements is an important aspect of victim-offender mediation, although it may be done in a number of different ways, through the mediator or through paid staff, for example (Bazemore and Umbreit 1999, citing Belgrave 1995). Yet VOM does not always include follow-up after the mediation or monitoring of the offender's compliance with the agreement; this is often done by another agency, although more is apparently being done in this regard to link enforcement with the actors involved in the mediation (Office for Victims of Crime 2000).

Victim-offender mediation (as compared to victim offender reconciliation programs which focused on the offender) began in large measure in response to victims' needs. As a result of early studies in the United Kingdom which showed that victims sometimes felt pressure to participate in victim-offender mediation or were "rehearsed" in their expression of their emotions to have a greater impact on the offender, guidelines and victim support services were implemented (Marshall 1998). The National Survey carried out in the United States in 1996 under the sponsorship of the Office for Victims of Crime also resulted in guidelines for victim-sensitive victim-offender mediation which address separate pre-mediation preparation sessions with and preparation of the victim and the offender, a humanistic dialogue-driven model of mediation, follow-up and make recommendations for program development and mediator training (Office for Victims of Crime 2000).

The engagement between the victim and the offender is often touted as the most important aspect of victim-offender mediation. Victims report that the opportunity to speak directly with the offender is often more important to them than any actual restitution which results from the mediation (Bazemore and Umbreit 1999). Victims may feel that they have regained some of the control which they had lost and which the traditional system does not offer them (Joseph 1996); they may be able to obtain answers to questions which have haunted them, such as "why me?" "How did you get into my house" or "were you watching me?" and set aside some fears about whether the offender will return (Price, "Benefits").[58] Yet an acknowledged alternative to face-to-face mediation is indirect mediation where the victim and offender do not meet, perhaps because the victim is not willing to speak directly to the offender; although the benefits may not be as great, it is practiced in the United Kingdom (Marshall 1998). The ABA requirements (1994) suggest only that a face-to-face meeting is "encouraged." A more abstract approach available when a victim or offender does not want to participate or the offender has not been identified is the victim-offender panel which brings victims who have been subject to a particular type of crime together with offenders who have committed that crime (Law Commission of Canada 1999; Lerman 1999). It is also worth noting that although victim-offender mediation is theoretically premised on the offender's being willing to acknowledge the harm he or she has done to the victim, a 1996 National Survey of VOMs in the United States indicated that offenders were required to admit their guilt in only 65% of the programs (Office for Victims of Crime 2000).

Attention to victim participation requires flexibility in scheduling mediation until the victim is ready (Marshall 1998), although it must be acknowledged that the impact of delay on the offender must also be considered, both from the perspective of the offender's "rights" and the offender's capability of connecting the process with the offence. Similarly, the attention to the victim is relevant to the determination of "who goes first:" some observers argue that the victim deserves to express her or his feelings towards the offender without having to take into account any apology, for example, but some programs believe it is easier on the victim if the offender speaks first and victims are often

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[58] This short on-line document sets out concisely the benefits of victim-offender mediation for victims, offenders, communities and the justice system.

"moved" when the offender offers an apology or shows remorse without having heard the victim (Office for Victims of Crime 2000). Llewellyn and Howse (1998) suggest that relying on the perpetrator to speak first makes the wrongdoer accept responsibility and places the victim at the centre of the process.

In the U.S. national study of VOMs, the mediator's role was defined most often as "facilitating dialogue between the victim and the offender," slightly less often as "making the parties feel comfortable and safe," and about equally "assisting the parties in negotiating a mutually acceptable plan for restitution of the victim" and "actively listening to both parties," although these last elicited more responses than a number of other typical mediator activities (Office for Victims of Crime 2000). Most programs provide training for community volunteer mediators, particularly for mediating cases involving severe violence (Office for Victims of Crime 2000). Co-mediation, used at least occasionally by 93% of the programs, was considered beneficial because it permitted greater opportunity for volunteers from the community, quality control, responding to diversity issues, more thorough case processing and debriefing, increased safety and teamwork (Office for Victims of Crime 2000). Mediators must be aware of their own culturally-affected behaviours and their implications, even if these behaviours are in themselves otherwise neutral, as well as his or her biases and predispositions. It is also important to understand whether an offender's motivation for committing a crime was in some way related to race (for example) and whether a victim is demanding more from an offender for a similar reason (Umbreit and Coates 2000). But mediators must also find a balance between awareness of "cultural" differences and responding on the basis of stereotypes or generalized presumptions about how people will act (Delgado 2000: fn.96 which indicates a number of ways in which discussions of "cultural difference" may be based on stereotypes, although note that these examples rely heavily on a 1986 article by Umbreit). Victim offender mediation must also take into account and negotiate different views about mediation and restoration held by different ethnic communities (Currie and Kiefl 1994; Llewellyn and Howse 1998).

The U.S. 1996 National Survey included interviews with persons involved with VOM which indicated that effective programs require support from the community, the willingness of victim support groups to consider restorative justice and availability of volunteer mediators; some of the concerns with the programs were lack of understanding about the program among court personnel, a tendency to shorten or eliminate the preparation phase by volunteers or as a result of lack of funding and transient volunteer populations, requests to mediate more serious and complex cases for which mediators may not be trained; and disagreements about the importance of the preparation phase. The programs often operate in isolation with the result that mediators often do not have the opportunity to discuss or brainstorm approaches. Furthermore, confusion about the "appropriate" objectives of the program with the result that obtaining the appropriate balance of benefits to offender and victim may not always be easy and may depend on who is responsible for running the program (Community Law Reform Commission 1993). The 1996 National Survey of victim-offender mediation programs in the United States showed, however, that most program directors were enthusiastic about the benefits of the program for the victim and offender and the community (Office for Victims of Crime 2000).

Studies of victim-offender mediation indicate that over 85% of the sessions resulted in an agreement and that was significantly higher than was the case with court-ordered restitution (Umbreit 1994; Office for Victims of Crime 2000; Marshall 1998). Far more offenders who met the victim completed their restitution obligations compared to those who had not participated in mediation (Umbreit 1994).

In one study of VOM, 18% of offenders recidivated compared to 27% in the regular system and their crimes were less serious (Bazemore and Umbreit 1999), while Marshall (1998) indicates that lower rates of recidivism may be connected with direct contact with the victim (rather than indirect mediation) and first time offenders.

It has been reported that "victim satisfaction with VOM has been uniformly high" (Bazemore and Umbreit 1999, citing Umbreit and Coates 1993 and Belgrave 1995; Office for Victims of Crime 2000), although Bonta *et al* (1998) indicate that sample selection and other factors may influence the results and report Umbreit (1994) as showing 64% attrition rate in his study of four victim-offender mediation sites, yet concluding a high degree of satisfaction among victims. Seventy-nine per cent of the victims in the Umbreit's 1994 multi-site study were satisfied with the process compared to 57% who had gone through the normal court process; victims were "significantly less fearful of being revictimized" after they had met the offender (Umbreit 1994), although Marshall (1998) points out that we do not know whether less fearful victims are more likely to participate in the mediation process.

Although most victim offender mediations take place with juveniles, Umbreit and Bradshaw (1997) compared victim satisfaction with a program for juveniles in Minneapolis and satisfaction with a program for adults in Winnipeg. Although victims were generally satisfied with the process, those mediating with adult offenders had a greater fear that the offender would commit another crime against them and were less likely to "improve" their attitude towards the offender; they also had lower levels of satisfaction with their participation in the larger justice process (explained by Umbreit and Bradshaw (1997: 38) as reflecting the fact that victims of adult offenders were already more likely to have participated in the system than were victims of juvenile offenders).

Some victim offender mediation programs do not involve anyone (including juvenile offenders' parents) other than the offender and the victim because they believe other attendees might dilute the benefits of the face-to-face contact between victim and offender, while others believe support helps the session and the follow-up phase (Office for Victims of Crime 2000). Marshall (1998) has referred to the "excessive individualism of victim/offender mediation practice" which gave the impetus to the development of a restorative justice approach involving the community called group conferencing.

3.4.3.3 (Family) group conferencing

Conferencing is a meeting among offender, victim and members of the community and perhaps even the arresting police officer (Van Ness and Strong 1997: 73; Braithwaite 1999). In some cases, the emphasis is on including the family of juvenile offenders, while in others, the conference would include members of the larger community.[59] Although conferencing is widely considered to be a restorative justice initiative, Umbreit and Zehr (1996: 25) state that the original conferences were not based on restorative justice principles; rather, restorative justice has modified them or increased the models which are grouped as "conferencing."

Family group conferencing originated in New Zealand where it arose from Maori tradition and was subsequently legislated as the standard way to deal with juvenile crime (Bazemore and Umbreit 1999). It was then adapted in Australia by the police and, more recently in Canada and the United States (Umbreit and Zehr 1996). FCG is a major feature of the Nova Scotia Comprehensive Restorative Justice Program, having been in place prior to the establishment of the comprehensive program (Archibald 1999: 526). Conferencing is also a major aspect of the proposed federal youth offender legislation (Bourrie 2001).

A Community Justice Forum (CJF) is a form of conferencing instituted about four years ago by the Royal Canadian Mounted Police as an outgrowth of community policing, is "a meeting of all those affected by an offending incident gathered by a neutral facilitator to solve the problem fairly and meaningfully" (Cooper and Chatterjee 1999). CJF involves facilitation by member of the RCMP or by members of the community and can be instituted for a wide variety of offences ranging from theft under $5,000 and common assault to (far fewer cases) sexual assault. The vast majority involves persons 19 or younger.

The goals of FGC include involvement of the victim in decisions about appropriate sanctions; increasing the offender's understanding of the harm caused by his or her behaviour and providing an opportunity for the offender to take responsibility for his or her behaviour; involving the offender's support system in a collective fashion in the offender's future behaviour; and allowing both the victim and the offender "to reconnect to key community support systems." Used primarily in juvenile cases, the term "family" is used broadly, since participants other than the victim's and offender's immediate families might be involved, such as teachers, special friends, the arresting officer or other persons playing a significant role in the offender's life (Umbreit 2000). Because of the inclusion of community members, Marshall (1998) emphasises that group conferencing may be a more effective tool for social reintegration of the offender than is victim offender mediation.

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[59] Circles are also a form of conferencing. Because of their association with Aboriginal communities, they raise distinct issues and we therefore discuss them separately *infra*.

Not all family group conferencing is based on the same principles, even though many of the same processes are in place. For example, FGC in New Zealand is based on restorative justice principles with reference to early VOM and VORP experience, while the Wagga Wagga model in Australia is based on Braithwaite's "reintegrative shaming" theory (Umbreit 2000; Braithwaite 1999a). This concept or process is based on the premise that committing certain acts can be shameful for the offender. Shame can be used to stigmatize the offender, as is usually the case in western systems, or to reintegrate the offender into the community, as is the case in some African or Asian systems (Braithwaite, "Crime, Shame and Reintegration"). Stigmatizing shame leads the offender to reject the culture which has rejected him or her and find support and acceptance elsewhere, such as in a criminal subculture. Reintegrative shaming, on the other hand, is based on respect for the person, emphasizing that the offender is a good person who has done a bad act. Reintegrative shaming is most successful in strong communities (Braithwaite 1999a). The role of the community or of persons who are close to the offender means that "denunciation" comes from someone who is loved and respected rather than from a distant authority figure. More recently, there has been a move away from the "shaming" aspect of family group conferences and it may be considered a precondition of access to a conference that there is a sense of interdependency between the offender and those disapproving of the offence and "countering the inevitable stigma attached to offending by equally strong efforts at reintegrating (restoring) the offender and enhancing self-esteem (Bazemore and Umbreit 1999, citing a FGC from Victoria, Australia).

Umbreit and Zehr (1996) (also see Umbreit 2000) maintain that there are at least five potential dangers with FGC, especially the Wagga Wagga model: the New Zealand model involves prior meetings with the offender and family, but not with the victim and family and the Australian approach usually involves phone contact and only occasionally in-person contact; there is a greater emphasis on the offender during the mediation who (with his or her family) is seated first and speaks first; the presence of adults (including police) may inhibit the juvenile offender; since authority figures facilitate, instead of volunteer (or at least neutral) mediators, there may be at least an apprehension of bias or authoritarian practices in communication; and the Australian model follows a script which specifically tells conference coordinators not to be concerned about cultural needs and community preferences and assumes that the process will work as long as all participants trust the coordinator.

As with victim offender mediation, (family) group conferencing can be employed at different stages in the criminal process (Marshall 1998). Compared to VOM, there is some dispute about whether significant preparation is dysfunctional in reducing the impact of the offender's and victim's stories (Bazemore and Umbreit 1999, citing Umbreit and Stacy 1995). There is also less emphasis in this model on enforcement than in some of the other models; it may be informal and may lie with the offender or it may be the responsibility of the police who convened the conference (Bazemore and Umbreit 1999). Also in contrast to victim-offender mediation, however, there is greater emphasis on the offender and in educating the offender about the harm caused by his or her behaviour. The offender speaks first because this is said to facilitate the offender's "owning of his or her behaviour, as well as to "put the victim at ease following the offender's formal apology" (Bazemore and Umbreit 1999, citing McDonald *et al* 1995). The emphasis on forgiveness for the offender has been criticized because it may place pressure on the victim; for some commentators, there is insufficient attention paid to victim empowerment (Bazemore and Umbreit 1999, citing Umbreit and Stacy 1995; Umbreit and Zehr 1996; Marshall 1998). Indeed, the family group conference has been described as "the strongest of all the models in their potential for educating offenders about the harm their behavior causes to others," but may be weak in addressing victim concerns (Bazemore and Umbreit, 1999, citing Alder and Wundersitz, 1994; Belgrave, 1995; Umbreit and Zehr, 1996). Bazemore and

Umbreit (1999) suggest, however, that the concerns arising out of the early experiment with family group conferencing in New Zealand should not lead to the conclusion that there is insufficient attention paid to victim concerns in this model and point to studies indicating greater victim satisfaction with this model in the United States (citing Umbreit and Fercello 1997; Fercello and Umbreit 1998; McCord and Wachtel 1998) and South Australia (also see Marshall, 1998).

Umbreit and Zehr (1996: 25) report that with the integration of greater attention to the victim, a New Zealand judge "terms the approach as the first truly restorative system institutionalized within a Western legal system." Marshall (1998) describes conferencing as "a restorative justice process *par excellence*," given "its combination of victim restoration, offender reintegration, individual participation and community involvement," but suggests that it may not be necessary where all these goals do not need to be met.

Despite the differences between VOM and (F)GC, Umbreit and Zehr (1996)'s recommendations for appropriate FGC practices reflect the practices of VOM in many respects. For example, they suggest that preparation should include in-person meetings with the primary participants and that if a public agency initiates an FGC, a trained community facilitator should also be involved in the sessions. Furthermore, victims should be able to choose when and where to meet and to present their story first, both recommendations which change the focus of conferencing. The impact of these recommendations would be to lessen the differences between victim offender mediation and conferencing.

There have been fewer studies of family group conferencing than of victim offender mediation, although those that have been completed indicate participant satisfaction (Van Ness and Strong 1997: 74). The RCMP's review of the CJF process indicated that the process was successful with both offenders and victims and their supporters; furthermore, "the restorative justice initiative, although initially implemented as an extension of the Aboriginal Justice Strategy [of the Department of Justice Canada in 1991], has expanded far beyond the Aboriginal communities into the mainstream and that communities which are aware and well-informed about this approach, are usually receptive" (Cooper and Chatterjee 1999). It has been acknowledged, however, that the study of CJF processes was not systematic and could not be considered to meet adequate study standards. In particular, it appears that some victims felt some pressure to participate (Cooper and Chatterjee 1999).[60]

3.4.3.4 Aboriginal communities and circles

As we indicated in Chapter 2.0, aboriginal communities and issues focus heavily in any consideration of access to criminal justice for two main reasons: the first is that members of aboriginal communities have been ill-served by the predominant legal system, whether there are offenders or victims; the second is that current theories of enhanced access to criminal justice rely heavily on approaches which were traditional in and have already been reestablished in aboriginal communities. In Canada, section 718.2(e) of the *Criminal Code* constitutes legislatives recognition of "innovative sentencing practices, such as healing and sentencing circles, and aboriginal community council projects" which "share a common underlying principle: that is, the importance of community-based societies" (*Gladue* 1999: para.74).

One example of a specific restorative justice project is found in agreements entered into in 1997 by the Saskatoon Tribal Council (comprising seven First Nations located in the central portion of Saskatchewan) and government funders with respect to both on-reserve and urban Aboriginal people. Elders were involved in these initiatives; the process of seeking their participation followed Aboriginal practices (Boyer 1999). Restorative justice initiatives include healing centres for federal offenders, either conditionally released or with inmate status, under the guidance of Elders, under section 718.2(e) of the *Criminal Code* (Programs). There are also programs specifically developed for reserves. As Boyer points out, on the one hand, "[m]any of the problems and issues are the same on reserve or in the urban environment;" on the other hand, the reserve community is more close knit and thus community-based initiatives are easier to maintain. The initiatives include sentencing circles, healing circles, individual and community-based mediations, family group and community conferencing, cautioning, re-integrations (Boyer 1999).

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[60] The project was evaluated by the Research and Evaluation Branch of the Contract and Aboriginal Services Directorate (Cooper and Chatterjee, Appendix A).

In Ontario, aboriginal community councils have been established by native leaders in co-operation with local Crowns and the police (Report of the Criminal Justice Review Committee 1999: 60). The Crown decides whether offenders (who have admitted liability) will have the opportunity to participate in a sentencing circle; if the offender does participate, criminal charges are stayed or withdrawn, but may be reinstated if the offender does not appear or does not complete the program determined by the Council. Victim involvement is encouraged and the program may involve paying a fine, making restitution or participating in a treatment program.

Types of circles include "talking, healing, community and court sentencing circles, family and community conferences" with specific processes differing among aboriginal communities (Stuart 1997:202). Bazemore and Umbreit (1999) describe sentencing circles, which they say have been used most often in Saskatchewan, Manitoba and the Yukon, as involving several steps: the offender must apply for a sentencing circle process; the victim has the opportunity to be involved in a healing circle, as does the offender; the actual circle involving Elders, the offender, the victim and their families and supporters, other members of the offender's and victim's community and members of the mainstream legal system; and follow-up circles monitoring the offender's compliance with the plan developed by the circle. They identify the goals of circle sentencing as follows: promoting healing for all parties; providing an opportunity to the offender to make amends; empower victims, offenders, community members and families by involving them in a process for finding a resolution to the problem; addressing the underlying causes of criminal behaviour; building "a sense of community and its capacity for resolving conflict;" and "promot[ing] and shar[ing] community values." (See Stuart 1997 for a detailed description of preparation for circles in Kwanlin Dun, an Aboriginal community in the Yukon.) They do not include reintegration into the community which in some ways is at the heart of circle sentencing in the Aboriginal community. The extent to which the official actors in the criminal justice system are involved will depend on the type of circle (Stuart 1997: 202).

Under the Saskatchewan Youth Circle Program, for example, a circle is composed of the victim, the victim's family/support, the offender and the offender's family/support, community representatives and a professional facilitator from the program, with the guidance of Elders (Boyer 1999). Re-balancing requires the youth to perform tasks and to engage with other members of the community; in some cases, they will be involved in activities (such as canoeing) with the Saskatoon City Police. They meet with Aboriginal federal and provincial inmates to hear about the latters' experiences and "bad choices." When the conditions imposed by the circle have been met, the charges are withdrawn. Success is measured by changes in the youths' lives. Some of the youth who had taken part in the Saskatchewan Youth Circle program become involved again to assist other youth.

Boyer (1999) reports that in 1998-1999, of 108 cases in the Saskatchewan Youth Circle Program, twelve youth re-offended and one committed a more serious offence than the one he had originally committed. Boyer attributes the success of the program to the individual care given the youth (for example, urban youth must be picked up at home for appointments and transported to all activities) and points out that this requires extensive funding.

Preparation is particularly important in circle sentencing, as is the pre-circle involvement of the offender who may be required to meet with Elders and begin a reparative plan; this process is a way of indicating the commitment of the offender to the process (Stuart 1997). Similarly, the community and victim and her or his support group play an integral role in the follow-up and monitoring process (Bazemore and Umbreit 1999). It is important that all participants are trained in the circle sentencing process and that there is a healthy and strong relationship between the formal justice system and justice professionals and the community (Bazemore and Umbreit 1999). Without proper preparation and understanding of the purpose and traditions underlying the sentencing circle, they can be unsatisfactory and in Boyer's word "debased." Boyer (1999) concludes that "there is no role for either the judges, prosecutors and the police in community based justice." She suggest that the community should be able to hold its own circle at which it determines the offender's sentence which is then taken before the court. Similarly, although the federal *Corrections and Conditional Release Act* has provisions for the early release of Aboriginal offenders into their communities, and aboriginal offenders may develop a release plan in conjunction with the community's justice committee to be implemented by the community, Boyer (1999) reports that it was difficult to obtain information about the meaning of the provisions. It may be that Aboriginal practices challenge the relationship between the mainstream system and official agencies, on the one hand, and restorative principles and the community, on the other more directly than any other implementation of restorative justice practices. They are also more likely to raise tensions between reliance on government for funding and the desire for autonomous community practices.

Jonathan Rudin (1999) uses the Community Council Program at Aboriginal Legal Services of Toronto as an example of restorative justice in practice. Established in 1992, it is directed at Aboriginal adult offenders. The Program is not merely a step in the "regular" legal system, it is an alternative. Once offenders (who would otherwise be sentenced to a term of imprisonment) are involved in the Program, the charges against them are dropped and they never re-enter the mainstream system. The Community Council system is based on "kindness and respect" towards the offender; the offender is a participant in the full sense of the word, something that Rudin (1999) contends the structure of the court system cannot accommodate.

In Chapter 4.0, we consider the extent to which restorative justice seems to meet its own goals and whether it raises its own concerns which must be addressed before assuming that it is an acceptable way of increasing access to criminal justice.

4 A STEP BACK . . . TOWARDS THE FUTURE

4.1 Reflections

As Chapter 3.0 indicates, there are many projects underway to bring a new perspective and vision to the criminal justice system based on a radically different understanding the concept of "justice." These efforts are directed at implementing a concept of substantive justice, going beyond procedural justice to just outcomes for all participants. As we indicated in Chapter 2.0, restorative processes may well have the capacity, not only to take into account, but perhaps to respond to some extent with the specific problems facing an accused and the victim, arising out of the criminal offence; they may also have the capacity to help a community harmed by crime to reintegrate the offender, support the victim and respond to its members' fears about social disorder. Yet the trend towards restorative justice measures needs to be complicated by considering whether they are really the "panacea" some of their proponents believe. Part of the difficulty with restorative justice is knowing what it really is, since the term is applied from everything from a revolution in justice to limited measures such as victim compensation schemes. For some, restorative *justice* is too little (they would bring restorative justice principles to bear on all societal practices), while for others even some of claims made for it in the more confined sphere of the criminal legal system are too much (for them, restorative justice poses a serious risk of heightening the inequality already characterizing criminal justice).

In this chapter, we step back and reflect on the measures discussed in the literature and implemented in practice in response to the criticisms of the mainstream criminal legal system and the needs of those who participate in it. We also suggest some directions for future research.

The on-going experiment in restorative justice raises a number of questions which should be addressed before we can conclude that these practices will increase access to criminal justice. Are some forms of restorative justice inappropriately transferred from cultures with different norms and values (Marhsall 1998)? A related concern is whether the concept of "community" which underlies restorative justice, particularly conferencing and circles, is meaningful in urban settings (Bussman 1992; Roach 1999; Law Commission of Canada 1999; Hudson 1998a; Manson 1998; Delgado 2000). Do these programs acknowledge and provide ways of addressing internal community power differentials and possible conflicts between the goals of victims and the community (Bazemore and Umbreit 1999; Law Commission of Canada 1999)? To what extent do restorative justice principles recognize how gender, racial and class may affect victims and offenders or worsen the position of particular groups compared to the mainstream system (Mika 1992; Marshall 1998; Van Ness 1999; Roach 2000; Delgado 2000)? Is the recourse to restorative justice initiatives by government at least in part a convenient way to "download" services without providing adequate resources (Marshall 1998; Law Commission of Canada 1999; Roberts and LaPrairie 2000)? Are restorative practices appropriate for all kinds of offences or should there be a dual system of retributive and restorative justice practices either for philosophical or efficacy reasons (Bussman 1992; Joseph 1996; Roach 1999, 2000; Delgado 2000)? If they are associated with the mainstream criminal legal system, will restorative justice principles be undermined by that system or even exacerbate the problems identified with the mainstream system (Van Ness and Strong 1997; Llewellyn and Howse 1998; Umbreit 1999; Bazemore and Umbreit 1999; Law Commission of Canada 1999; Field 1999; Roach 1999; Delgado 2000)?

We consider first a number of issues raised by the importance of "community" in restorative justice approaches and practices. As we discussed in Chapter 3.0, one of the major goals of restorative justice is to bring justice back to the community and to involve the community with the offender and the victim in reaching a just solution to the harm created by the offender's wrongdoing, although, as we have seen, not all forms of restorative justice emphasize this to the same extent. The extended community is crucial to circle sentencing, may be limited to the juvenile offender's family in family group conferencing and may not be involved at all in victim offender mediation. On the other hand, "bringing courts to the community" may be considered a restorative practice by some observers. Yet what is meant by "community?" Even if we can identify the community, what kind of internal dynamics enhance or impede restorative justice? Do communities have sufficient resources to implement restorative justice adequately?

The identification of "community" matters not only because restorative justice may involve the community, but also because the particular characteristics of a community ought to be taken into account in developing restorative justice practices. For example, circle sentencing recognizes that western systems have destroyed many traditional aboriginal practices because those systems were based on principles and norms sometimes antithetical to those of many, although not all, aboriginal communities. We should be similarly wary of importing approaches to the mainstream system which are based on fundamentally or at least significantly different world views or on particular characteristics, such as a well-defined community with an easily identified relationship to the offender (and victim, in fact) (Marshall 1998). Yet some commentators propose transferring practices developed in very different cultural settings to western jurisdictions. Concepts such as reintegrative shaming require a community about whose opinion the offender cares and cannot readily be used in contexts in which the state or other "anonymous" authority attempts to impose shaming (Marshall 1998); it requires, too, a culture in which apology and forgiveness are the norm. The same practice may have quite different implications in different cultural settings. Thus minimizing the presence of the Crown in circle sentencing is a tacit (and perhaps more explicit) acknowledgement of the legitimacy of some form of aboriginal self-government; but minimizing the presence of the Crown in the majority legal system may be viewed as a denial of state interest in offences against victims.

Without the involvement of community, Hudson (1998a: 251) argues, "restorative justice is reduced to the competing perspectives of the victim and the perpetrator." Involving the "community," however, requires us to identify it. The identification of community is difficult in the contemporary urban world (Bussmann 1992: 320), where many residents are "immigrants" to their neighbourhoods. As Roach (1999) asks, "[a]re [restorative justice initiatives] viable in a mobile, busy urban environment in which you may not know or even want to know your neighbour?" Hudson (1998a: 251) points out, "[Most] of us now inhabit not 'communities,' but shifting, temporary alliances which come together on the basis of private prudentialism." In some cases, the "community" will be determined by the scope of the offence. Thus juvenile vandalism may occur within the range of a few blocks; the residents and shopkeepers in this area may constitute the community for certain purposes. Yet by community, we also mean those who are in some way associated with the offender or the victim or both; in the context of reintegration, for instance, there must be an association between offender and community which is more than that created by the offence itself. If the offender is to work in "the community" as part of the process of restoration, in which community does he or she work? Delgado (2000: 769) wonders, for example, whether a poor minority offender should work for a middle class white victim, for a predominantly white charitable organization or in his or her own community: what is the purpose of the work and how does it relate to the concept of "community?"

Post-modernists would reject the notion of community, while in contrast Delgado (2000: 769) points out, "[i]n a diverse, multicultural society, many collectivities may vie for...status [as "the community"]" and Meyer (2000: 1519) finds that we "define ourselves in myriad ways." Yet at least one participant in an early project combining legal and social services in Atlanta, Georgia (now labeled a restorative justice project) has been forced to conclude that restorative justice may succeed only in homogeneous communities (Ammar 2000: 1591). Even where we think the identification of community is easy, as in the case of Aboriginal circles, this may not be the case in urban rather than reserve settings (Manson 1999: 489). We need to establish more clearly the meaning and purpose of community in restorative justice initiatives (is the community always the same for purposes of reintegration and restoration, for example?) and develop ways of ensuring that there is some kind of organic connection between the offender and the community which makes the interaction between offender and community meaningful.

Even if it is possible to define the parameters of the relevant community, Ashworth (1993: 294) is critical of the vagueness of the concept of "community harm" in restorative justice and asks how the nature and quantum of harm to the community can be assessed; what forms of restorative justice should be used; and how does this process differ from one based on punishment? Van Ness (1993) suggests that Ashworth does not appreciate the difference between the community and the state and thus the importance of recognizing the distinct interest of the community does not answer Ashworth's questions, which remain valid even if one assumes that they can be answered.

It is also important to acknowledge and redress imbalances of power within the community and conflicts between the norms and goals governing victim participation and those governing community involvement. It is crucial that a balance between the sharing of power with the community and maintenance of restorative justice principles be maintained. On the one hand, a failure to recognize community differences may result in these initiatives being subsumed within or co-opted by the traditional system, a point to which we return below. On the other hand, a failure to monitor community-based initiatives adequately may run the risk of powerful members of the community unduly influencing the process or diminishing the involvement of more vulnerable groups (Bazemore and Umbreit 1999, citing Griffiths *et al* 1996). Replacing state control with community control "may make some liberal individualists uneasy and ... raises concerns for those who are sceptical about the possibilities of non-coercive local politics and self-governance" (Roach 2000). Yet the idea that community politics are in equilibrium or that in some communities, certain classes of people are not at a disadvantage because of gender, race or class is unrealistic. As we pointed out in Chapter 2.0, some commentators have been concerned about how state control has been replaced by social control with the potential to divide communities rather than heal them (Griffiths 1999: 293, quoting LaPrairie 1996).

A related issue is how disagreements between the victim and the community about the appropriate "restoration" are to be resolved (Law Commission of Canada 1999). Increased victim involvement in the mainstream criminal justice system has been in part motivated by the perception and reality that the interests of the state or the Crown are not necessarily those of the victim; yet there may well be instances in restorative justice processes where victims and the larger community are at odds. It may also be that particular communities families engaged in conferencing will expect different behaviour from male and female offenders and treat them differently in determining sanctions for the same reason, although at least one study in New Zealand indicates that "women seem to confront fewer traditional disadvantages to active participation than in other dispute resolution alternatives"

(Van Ness 1999: 267, relying on Maxwell and Morris 1996). In some aboriginal communities, however, flags have been raised about the treatment of wife abuse; concern about restoration of aboriginal culture has often failed to take account of differential experiences in aboriginal communities for women (Zellerer 1999; Lash 2000). One of the risks with restorative justice approaches is that while they may take into account the offender's status, they may be less likely to understand the need to provide the victim with the means of overcoming the cultural and patriarchal oppression underlying wife abuse and the cultural norms which make it difficult for them to demand redress for violence (Miedema 1996; Miedema and Wachholz 1998).

Where communities become involved through the action of government,[61] to what extent is community involvement merely a reflection of downloading from government to other entities or the process of privatization? And do adequate resources accompany the increased responsibility (Marshall 1998)?

The coincidence of timing of restorative justice projects raises the spectre of the more general trend to "downloading" of government activities which has occurred over the past decade or so or, in a variant of that concern, from the desire to remove some of the pressure from overloaded courts (Law Commission of Canada 1999), a criticism made about mandatory mediation in the civil context (Menkel-Meadow 1991; Street 1998). Nova Scotia officials explicitly deny that downloading plays a part in its restorative justice program (Nova Scotia Department of Justice 1998). Nevertheless, as provincial functions have been downloaded to municipalities, so, it might be said, centralized legal functions have been downloaded to the local community. While in both cases, there might well be some normative justification for this transfer, in other cases, there may be concern that the allocation or transfer of resources has not kept pace with the transfer of function.

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[61] In this context, the "community" is likely to be defined as, for a example, a judicial district or municipality or an aboriginal community or reserve. Community is likely to be determined on the basis of convenience for instituting government programs.

Restorative justice projects are labour intensive, requiring a great deal of preparation of the major participants and training of facilitators and mediators. These processes require real and not perfunctory participation with a commitment to changed behaviour in the future. As we indicated in Chapter 3:0, family group conferences may implement only perfunctory preparation. Bazemore and Umbreit (1999) compare elements of "community justice" on the basis of compliance with restorative justice principles. For example, restorative justice requires a dialogue between the offender and victim, while a complete focus on financial reparation has the least restorative impact; a voluntary process with separate preparation meetings, giving the victim choices and an opportunity to speak first, non-directional mediation by a trained community volunteer based on a transformative model with a high tolerance for expression of feelings, lasting at least an hour are all reflective of restorative justice compared to a process which is mandatory for the offender, with no separate meetings, giving victims little choice or opportunity for involvement, highly directive mediation by paid lawyers or other professionals who talk a great deal compared to the parties and have a low tolerance for expression of feelings (or silence) and which is settlement-driven and lasts for perhaps 15 minutes. Despite the emphasis on "encounter" between the victim and the offender, short cuts are tempting where resources are inadequate.

Nor should it be presumed that families will automatically respond positively to involvement in family group counseling or victim-offender mediation; education about the processes is crucial. Therefore, it is necessary to commit the resources necessary for trained facilitators, preparatory work and time for the actual mediation or conference (Marshall 1998). Roberts and LaPrairie (2000) report that nearly a third of judges who considered conditional sentences could not find out about the community resources available and that more judges would impose conditional sentences if there were more community resources available. Similarly, for community involvement in and acceptance of conditional sentences, it is necessary that resources be expended to inform the public be informed about why conditional sentences are a satisfactory substitute for imprisonment (Roberts and LaPrairie 2000).

A variant of concern about the amount of resources allocated to restorative justice is how resources are delivered and controlled. As we indicated in Chapter 2.0, Lancaster (1994: 349) has cautioned against targeted resources and advocated "holistic" funding which permits customary approaches to apply in the community, while working with outside justice institutions. We also asked in Chapter 2.0 about the extent to which some of the resources now being allocated to restorative justice (and thus within the criminal justice system), were previously allocated to social programs, since as a result of the withdrawal of those social support services, and as a result of the criminalization of certain activities, youth and marginalized adults may well become criminal offenders (National Council of Welfare 1995, 2000; Roach 1996: 239; Martin 1999: 190-91, 193). In short, it is important to understand how restorative justice practices may have been co-opted to serve this revised criminal/social dynamic.

Concerns about the privatization of justice take another form. In stressing responsiveness to the needs of offenders, victims and communities, these approaches often fail to factor in the systemic implications of crime, looking more to the individual or to a generic 'victim" or "offender." Crime becomes less an affront to the state or society as a whole and more an intrusion of an individual victim's rights and – perhaps – the concern of the local community. To what extent, therefore, are these projects another example of the privatization of justice or individualization of systemic concerns (Mossman 1997; Hughes 1997)? The symbolic value of the state's condemnation of certain kinds of activities becomes simply a dispute between the victim and the offender, particularly of concern in domestic, sexual and racial crime (Hudson 1998: 247). Privatization of justice, whether in the civil or criminal context, often fails to address the societal interest in ensuring that widespread wrongdoing is known and addressed or that societal values are reaffirmed (Fiss 1984; Braithwaite and Parker 1999: 108; Delgado 2000). Bussann (1992: 318, 319) points to the way in which the "criminal law, its institutions, and sanctions symbolize existing social moral or basic values," while mediation lacks such symbols. Roach (2000) argues, however, that privatization is not in itself the problem; rather the real issue if whether there will be adequate funding for restorative justice initiatives. Bussann (1992: 323) suggests that mediation reflects the importance rational communication or discourse plays today; increasingly, people listen to each other and respond to each other's arguments. This discursive quality – the "encounter" between offender and victim – is reflected in informal or unofficial dispute resolution processes generally, civil, as well as criminal. Again, however, the potential of discourse lies in adequate preparation to ensure as much as possible that the victim and the offender appreciate the nature of their meeting and the opportunity through a face-to-face meeting, to come to greater appreciate their respective situations.

While some proponents would replace retributive justice with restorative justice (perhaps with separation of offenders, that is, incarceration, where unavoidable), some would go further and eliminate the boundaries between civil and criminal justice. Van Ness and Strong (1997: 49) maintain, however, that the criminal law serves different purposes from those served by the criminal law: "it provides an effective method of vindicating the rights of secondary victims, it restrains and channels in acceptable ways retributive emotions in society, and it offers procedural efficiencies in enforcing public values." At the same time, proponents of restorative justice express concern that restorative justice will be undermined or distorted by association with the mainstream system with its emphasis on the offender and its coercive character (Van Ness and Strong 1997: 60). Some commentators maintain that if the formal system maintains control of the new processes, instead of sharing power, the result will be "net-widening, rather than the development of more effective alternative decision making processes" (Bazemore and Umbreit 1999, citing Polk 1994; Messmer and Otto 1992: 3). There is a real danger of increased criminalization of activities which would not otherwise be the subject of a criminal charge with a disparate impact on the poor and members of vulnerable groups (Levi 1997: 758). Since restorative justice often applies in the case of minor crimes, and since a failure to abide by the conditions imposed in a restorative justice process may result in imprisonment, restorative justice processes applied uncritically may merely serve to enhance to disadvantages suffered by those who are already effectively "outside the system" and without recognized community supports.

Some of the questions about the relationship between restorative justice and the mainstream criminal legal system can be traced to the debate between "rights" and "needs" to which we referred in Chapter 2.0. Van Ness (1993: 259) argues that the objective of restorative justice is to address "the need for building safe communities as well as the need for resolving specific crimes." Thus although Van Ness does not wish to jettison the criminal courts altogether, it is evident that he wants to see "healing" given a higher priority than "punishment." Ashworth (1993), on the other hand, differentiates between the function of criminal justice and the function of civil justice, with the latter being the appropriate recourse for claims of harm. Similarly, he differentiates between the right of victims to services (such as restitution and better communication) and the right of victims to be involved in criminal law processes. The latter may distort the goals of criminal justice, such as fairness (that is, consistency) in sentencing by imposing a more stringent sanction against an offender whose victim experienced great harm than against another offender whose victim experienced less harm as a result of the same crime. Without a clear understanding of restorative justice principles -- and a reluctance to apply them to any "difference" in the mainstream system --, the traditional system may subsume "new" approaches for its own purposes with, among other consequences, more control of and sanctions against the offender (Kurki 2000: 287-88).

Much of the restorative justice literature glosses over differences in power between victims and offenders or between certain offenders and others, as well as the extent to which mediators or facilitators can pressure victims and (especially juvenile) offenders (Kurki 2000: 286). In one stream of restorative justice, at least, the emphasis on healing and forgiveness fails to acknowledge these differences. Requiring forgiveness may result in the victim's need to reassert his or her sense of self, diminished by the crime against him or her, being overwhelmed by pressure to forgive (Ammar 2000: 1586; Delgado 2000), since "the focus when someone forgives is predominantly on the other person, not on oneself (Enright and Kittle 2000: 1630). Indeed, Garvey (1999: 1828) contends that "[i]t reflects a moral failure . . . for victims to withhold forgiveness unreasonably from offenders who have done all they can do to expiate their guilt . . . Forgiveness is something victims ought to give even if they are not obligated to give it." This pressure on victims distorts the relationship between victim and offender in a way that is reminiscent of the re-victimization of the victim in sexual assault cases in the traditional criminal system.

Furthermore, restorative justice often seems "apolitical," failing to take into account *structural* inequality and imbalances of power between victims and offenders. Mika (1992: 561, 563), for example, maintains that victim offender reconciliation reveals an "astructural bias" manifested in the assumption that the individual relationship between the victim and the offender "transcends" the socio-structural relationship and ignores the social context. Braithwaite and Parker (1999: 107) contend that conferences "are in danger of doing too little justice with too little equity," although they argue that it is possible to overcome this danger. While sometimes offences (such as wife abuse) may reflect an on-going relationship of domination and subordination between the victim and the offender, in other cases, offenders may be poor or otherwise disadvantaged compared to a middle-class victim and "it will be the offender who needs a better education, increased job training, and an improved living environment" (Delgado 2000). Llewellyn and Howse (1998) answer these concerns about power imbalances by suggesting that the parties should help establish the ground rules, yet this seems more likely to reinforce the power imbalance than to dismantle systemic power hierarchies.

Some proponents of restorative justice argue that it should not be expected to solve "the deep structural injustices that cause problems like homelessness or hunger" (Braithwaite and Parker 1999: 108), although, as we mentioned in Chapter 3.0, others are turning away from restorative justice to the more ambitious restorative governance. Nevertheless, Braithwaite and Parker (1999: 109) suggest that three "republican solutions" may meet the challenges posed to restorative justice initiatives: the rule of law governs with the result that formal proceduralism acts in a supervisory way to counter the excesses of informalism; "de-individualizing" the process by using community conferences more than victim offender mediation; and perhaps most idealistically, "[v]ibrant social movement politics that percolates into the deliberation of conferences, defends minorities against tyrannies of the majority and connects private concerns to campaigns for public transformation." Social movement politics acts to check the abuse of both state and community (Braithwaite and Parker 1999: 111).

Inequality may also be ignored – or even reflected in – the kind of reparation an offender may be required to make. Financial reparations are easily paid by economically advantaged offenders, but only with difficulty by others (Roach 2000). Community "services" may be a contemporary menial version of the punishment carried out by prison labour gangs (Delgado 2000: 769). It is not insignificant that one of the ways in which an advocate of a community court in Hartford, Connecticut measures success is by the nearly 43,000 hours the city has "benefitted" from the "community service" performed by offenders; this service, in the form of cleaning garbage from parks and vacant lots, loading trucks at soup kitchens (this advocate does not ask whether there is any connection between the need for the soup kitchens and the plight of at least some of the offenders) and clearing snow from handicap accessible curbs (Kaas 2000). On the face of it, some of these activities would be considered selfless examples of voluntary community services. In the context of community sanctions, however, one must ask how much free labour performed by offenders saves the municipalities in providing the services expected of them. Young (1999: 275) prefers the term "community restitution" to "community service" to differentiate it from both punishment and voluntary service, although Garvey (1999) believes that it should be viewed as punishment, since this is the only way for the offender to atone and for society to condemn morally the offender's actions. In any event, it is not difficult to see how community service sanctions may be a form of degrading shaming. Van Ness (1999: 267) recognizes that shaming may be degrading, but says that "[p]rogram guidelines and mediator and facilitator training must ensure that shaming is reintegrative rather than stigmatizing." According to Roach (2000), however, some proponents favour stigmatizing or humiliating penalties because they will help in obtaining public support for alternatives to imprisonment.

The lack of understanding of the impact of systemic power differentials (reflected in micro-level relationships between some victims and offenders) is marked out in another way. Their enthusiasm for restorative justice leads some supporters to suggest that there are few types of wrongdoing which are not suitable for these processes. Yet other commentators wonder whether there are some crimes which might not be suitable for mediation for a variety of reasons. For example, domestic abuse cases may be unsuitable for mediation (Joseph 1996). In light of the goal of restoration of the relationship, in the context of wife abuse and sexual assault cases, these processes may seem too much like the admonishment to "go home and sort things out" which until recently was too often the response to charges of domestic violence. Furthermore, not all communities may have developed the same degree of concern about sexual assault or wife abuse as has even the mainstream criminal legal system (Zellerer 1999: 354; Griffiths and Hamilton 1996: 188). Although some commentators have suggested that victim offender mediation might be employed in cases of severe crimes, including murder, they have also cautioned that more research needs to be done to determine whether there could be "unintended negative consequences, ... including a significant re-victimization of the victim" (Umbreit, Bradshaw and Coates 1999: 340).

The relationship between restorative justice initiatives and the mainstream legal system remains to be delineated. Many programs, while called restorative justice, are merely adjuncts to the mainstream process and are governed by the mainstream rules. Roach (2000) asks, "[i]f restorative and aboriginal justice represent legal pluralism and an alternative to state centred criminal law, will their incorporation in formal diversion programmes and especially in judge-driven sentencing distort them beyond all recognition?" More fundamentally, it has been observed that even though restorative justice challenges the meaning of "crime," "[m]ost programs are organised around criminal behaviour rather than around conflict that may or may not be criminal" (Law Commission of Canada 1999; Field 1999: 38). Llewellyn and Howse (1998) maintain that restorative justice cannot be run in conjunction with the existing system and they point to the power of the retributive system to dictate the course of restorative justice.

Much criticism of the mainstream system is directed at its reliance on rules. In contrast, restorative justice projects usually rely less on formal than on informal procedures. (See Joseph 1996: 216 for a concise summary of the differences between "conventional" and "restorative" values and assumptions.) Often this is desirable; at the same time, it is important to appreciate that formal procedures often are protective of both offender and victim (Marshall 1998; Nova Scotia Department of Justice 1998; Delgado 2000: 760, although he later (at 772) contends that the criminal justice system in the United States may be the only institution in which the formal processes are more racist than citizens' informal practices). Whatever the weaknesses of the trial, for example, it is based on well-developed practices about the rights of the accused and shields, to some extent, the victim from direct contact with the offender. It is these very practices that are set-aside in restorative justice. The offender may give up these rights in favour of a different penalty or outcome by pleading guilty. At the same time, it can be argued that this is little different from plea bargaining and other mechanisms upon which the current system relies (Van Ness 1999: 268). The victim, on the other hand, may feel pressure to participate in a restorative justice approach, even though she or he would prefer not to have to deal with the offender directly and may wish to leave the experience behind her or him (Gaudreault 1999: 6).

As restorative justice initiatives lose their novelty, there is the possibility that they will become perfunctory or practitioners will become satisfied with meeting minimum requirements or cutting corners reflective of a "loss of vision" (Umbreit 1999: 226). The same result may be compelled by inadequate resources; even if adequate resources are allocated initially, after the first euphoria about restorative justice has waned, will the necessary levels of funding be maintained? On the other hand, there is also the risk that those who are cynical about the process, including offenders who simply will learn to do what is necessary to avoid imprisonment or to receive "the lightest restitution agreement possible" (Delgado 2000: 766).

4.2 Future Directions

Throughout this assessment of new approaches to access to criminal justice, we have referred to the concerns commentators have expressed about these processes or about their implementation in the current criminal justice system. In the previous section, we "reflected" on some of the issues raised by restorative justice principles and processes. In this section, we focus on the issues of evaluation and equality.

We reported in Chapter 3.0 that the studies of restorative justice measures – primarily of victim offender mediation – have reported high levels of satisfaction by victims and offenders. We also indicated some of the concerns with the lack of methodological rigor of many studies. Rigorous and relevant evaluation remains to be done. Bazemore and Umbreit (1999) argue that potential restorative justice models should be assessed on the basis of whether they create or strengthen positive relationships, increase community skills in problem-solving and constructive dispute resolution, increase the community's sense of its capacity to solve problems, "increase individual awareness of and commitment to the common good" and create informal support systems and safety nets for both victims and offenders. These may be praiseworthy goals, but they are also difficult to measure. Since restorative justice objectives "may encompass macro-level dimensions such as cultural and community revitalization and empowerment, as well as community, family and individual healing," evaluation is difficult and requires distinct measures (Griffiths and Corrado 1999: 252).

We indicated in Chapter 3.0 that studies of victim-offender mediation and family conferencing show high level of victim and offender satisfaction and lower rates of recidivism compared to the traditional system and higher rates of compliance with restitution agreements than with restitution orders. After reviewing the evaluations of a number of projects which generally show high levels of victim satisfaction, Immarigeon (1999:321) concluded that "they only touch lightly on the myriad concerns and questions of interest to crime victims" and fail to address what long-term impact participation may have on victims' attitudes towards crime and themselves. Schiff (1999) similarly finds that the research shows "encouraging" results with respect to offenders' involvement in restorative justice initiatives, but cautions that it is important to identify when restorative justice processes are coupled with retributive sanctions labelled "restorative" and more generally, "the extent to which a program is truly restorative in nature and not simply a transmogrified retributive approach." She refers, as well, to the potential for discrimination in the selection of offenders who are directed to restorative initiatives and for net widening (Schiff 1999: 344). Bonta *et al* (1998) report a lack of consistency in the apparent impact of restorative justice approaches on recidivism, coupled with methodological problems in the evaluations of the programs. Some studies have shown that recidivism is only delayed (Kurki 2000: 272).

It is important to measure restorative justice projects using criteria which reflect the particular goals of restorative justice, both with respect to process and outcome. Bazemore and Umbreit (1999), speaking primarily in the juvenile context, conclude that there has been inadequate evaluation of many restorative justice programs. They point out that evaluation involves different criteria from that of recidivism rates usually used to evaluate the traditional system; these criteria include outcomes of community empowerment and solidarity, victim interests and crime prevention. Braithwaite (1999: 1749) maintains that the "science of evidence-based crime prevention used to inform restorative justice must be rigorous and strong on statistical power, using randomized controlled trials when possible (combined with rich ethnographic engagement with the phenomenon." Kurki (2000: 285) complains that "[t]here have been too few efforts to estimate traditional measures, such as recidivism, crime, and victimization rates, and to create new measures to estimate community involvement, empowerment, and crime prevention."

A review of the literature suggests a number of aspects of restorative justice which need evaluation. There are insufficient data to explain why victims choose to participate or not and what the long-term effects on victims are; or how important a face-to-face encounter is compared to indirect mediation (Marshall 1998). Marshall (1998) also maintains that it is important to know whether mediation "offer[s] a significantly better deal to victims to warrant the cost" of victim offender mediation, for example.

In Chapter 1.0, we identified the degree to which the current and "new" approaches satisfy or enhance equality principles as one of the important issues to be addressed. One serious gap in the discussion of restorative justice is the extent to which it actually either enhances or diminishes equality. We know little about whether equality is achieved more in restorative justice processes, for both offenders and victims, than in other practices. If we knew whether these practices are "fairer" than criminal trials, it might be possible to use information about restorative justice processes to make criminal trials fairer (Braithwaite 1999: 1750). Apart from that possibility, however, we should expect restorative justice initiatives to have a positive impact on the development of equality. Yet while there is some theoretical discussion about this (although not a great deal in the main restorative justice literature), there is almost no evaluation of how practices measure up on this dimension. Studies usually do not report findings on dimensions of equality (Kurki 2000: 268). Accordingly, we suggest three studies which could help develop some empirical analysis on this point.

One of the great appeals about mainstream adoption of restorative justice principles is the opportunity for Aboriginal communities with a tradition of these practices (and, as we have noted, not all Aboriginal communities did follow these practices) to revive them. At the same time, one of the great challenges facing restorative justice is to ensure that its promise is realized; there has been inadequate evaluation to determine whether it has. This would be best accomplished by an ethnographic study of the application of restorative justice practices in a number of Aboriginal communities where restorative justice has been in place for longer periods to assess, among other things, the values reflected in the application of the practices, the treatment of the participants (for example, is there pressure on victims to participate?), the efficacy of monitoring of the sanctions applied to the offender and the long term impact on participants in these practices (for example, has the offender become successfully reintegrated into the community?). It is also necessary to establish definitely the consequences of involvement by or lack of involvement by state officials in circles, taking into account whether officials are (or can be) adequately trained to participate. The role of Aboriginal community circles and other practices as a form of self-government or as a variation on mainstream practices relies on information about the efficacy and other effects of the programs, as well as the nature and accountability for funding.

There has been inadequate consideration of the gender implications of restorative justice practices more generally. Therefore a pilot project comparing the attitudes and behaviours of female victims and male offenders who have committed gendered crimes (such as sexual assault and domestic abuse) with the attitudes and behaviours of female victims and male offenders who have committed non-gendered crimes (such as break and enter or property vandalism) would be helpful in determining the appropriateness of restorative justice programs for gendered crimes or the "protections" for victims which must accompany victims in these cases. We want to be clear that we have concern about the use of restorative justice practices in connection with crimes such as sexual assault and domestic abuse and suggest that it would be preferable to identify existing projects that already include these crimes, as well as establishing a distinct project with carefully developed protections for the victims.

A third equality concern relates to the diversion of offenders into privatized criminal justice: which offenders are more likely to be diverted with what consequences? For example, it is very different for a poor offender to be diverted and be required to perform services for a community or victim than for an economically advantaged offender to be diverted and be able to pay compensation or restitution as the main sanction. A study of a number of existing programs to identify the background characteristics of offenders, the reasons they agree to participate in restorative justice measures, the sanction imposed, whether the offender failed to satisfy the sanction and the consequences for non-compliance would help to show whether restorative justice is beneficial for disadvantaged and minority offenders. As we have indicated, a study of conditional sentencing has already indicated that Aboriginal offenders are disproportionately incarcerated for breach of conditions. We need to determine whether there are similar patterns arising from the broader application of restorative justice measures.

5 CONCLUSION

Restorative justice principles and processes are the most widely advocated way to increase access to criminal justice. Currently, however, restorative approaches are for the most part too intertwined with the mainstream criminal legal system on the one hand, and pose serious challenges themselves, on the other, to treat them as either a paradigm shift or a panacea. In many cases, "restorative justice" is used as a "catchall" for a wide variety of disparate initiatives, a number of them having been introduced within the traditional system in a manner consistent with the premises on which the mainstream system operates. Most studies fail to address the most significant questions about the effectiveness of these processes for recidivism (or, in restorative justice language) reintegrating the offender into the community) and equally significantly, do not adequately measure whether victims are "better off" participating in a process with the offender than in having their harm vindicated through the traditional processes. It is not irrelevant whether restorative justice is "better" than traditional approaches; costly though criminal justice may be, proper implementation of restorative justice programs requires considerable resources. While the rhetoric may be appealing, the practice is less so. Rather, as Delgado (2000) and others conclude, neither the traditional system nor restorative justice may be always fair; both may be characterized by race, class and gender bias, in one case hidden by the rules, in the other hidden by "an overlay of humanitarian concern." And as Bussmann (1992: 324) argues, in a modern society it is necessary to have both the symbolic value of criminal law, albeit perhaps only to the extent necessary to maintain the symbolism, and the discursive value of restorative justice. For victims and offenders, Delgado's (2000) advice to choose, where possible, the approach most suitable for their own objectives seems apposite. For governments, the rush to "restorative justice" needs to be tempered by a better understanding of its effectiveness and its effects.

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